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THE WORKMEN'S COMPENSATION ACTS

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THE WORKMEN'S COMPENSATION ACTS

BEING AN ANNOTATED STUDY OF THE

WORKMEN'S COMPENSATION ACT, 1897, AND THE

WORKMEN'S COMPENSATION ACT, 1900

BY

ADSHEAD ELLIOTT, M.A. (OXON.)

OF THE INNER TEMPLE AND NORTHERN CIRCUIT,

BARRISTER-AT-LAW

WITH AN INTRODUCTION BY

HIS HONOUR JUDGE PARRY

SECOND EDITION

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PREFACE TO SECOND EDITION

Owing to the favourable reception given to this book, the First Edition was soon exhausted, and a second one called for. In preparing the present edition for the Press, the book has been thoroughly revised and brought up to date, and includes all the cases decided in the House of Lords and the Court of Appeal, which have been reported prior to October 1st, 1901. The Scotch decisions are also included, and several decisions of special interest and importance in County Courts, which, I hope, will add to the usefulness of the book.

In this edition, also, there have been added, in Appendices, specimens of agreements under Schedule II. (8), a form of Notice of Appeal, the Workmen's Compensation Rules, 1900, and full extracts from all the material sections of the Factory Acts.

While I have added these new features in an endeavour to make the book more complete, I have thought well to adhere to the original

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form which, I understand, has been found convenient to practitioners, so that, though the book is now somewhat increased in size, no material alteration has been made in the plan or general arrangement.

ADSHEAD ELLIOTT.

7 BRAZENNOSE STREET, MANCHESTER,
October 1901.

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PREFACE TO FIRST EDITION

WHEN the Workmen's Compensation Act of 1897 first came into operation, I was called upon to act as Arbitrator for some six months in the Manchester and Salford districts. During that period, many of the points which are now settled law, came up before me for discussion, and it appeared to me that the time would come, when it would be very necessary to collect the decided cases in a short and concise form, and at the same time to set out at considerable length the very words in which the judgments were given. It is now more than two years since the Act came into force, and it has proved to be an undoubted fact, that the actual law of Workmen's Compensation depends almost as much upon the judgments delivered in the Court of Appeal, as upon the Statute enacted by Parliament. I have therefore sought to produce in this book a clear statement of the Statute law, as interpreted up to the present date by the judicial decisions, in a form which I

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hope may be clear both to the professional and non-professional reader.

It is almost too much to expect that the Acts, as they now exist, can be understood or appreciated by working men, but every endeavour has been made in these pages to state the legal position of workmen in non-technical language.

The Acts, together with the Rules and Forms published therewith, have been set out in full in the Appendices, so that reference can be easily made to them.

I am much indebted to His Honour Judge Parry for having written such an interesting Introduction; and also to my friend Mr. G. W. Heywood for having verified the references, and for other assistance he has rendered in preparing the book for publication.

ADSHEAD ELLIOTT.

ATLANTIC CHAMBERS,
BRAZENNOSE ST., MANCHESTER,
October 1900.

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ABBREVIATIONS USED

Law Times . . .	Law Times Newspaper.
L.R. Adm. . . .	Law Reports, Admiralty.
L.T.R.	Law Times Reports.
L.J. Exch. . . .	Law Journal, Exchequer.
Q.B.D.	Law Reports, Queen's Bench Division.
[ ] 1 Q.B. . .	Law Reports, Queen's Bench Division, as cited since 1890.
[ ] 1 K.B. . .	Law Reports, King's Bench Division.
[ ] A.C. . . .	Law Reports, Appeal Cases, as cited since 1890.
S.L.R.	Scottish Law Reporter.
T.L.R.	Times Law Reports.
Times	The Times Newspaper.

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INTRODUCTION TO FIRST EDITION

WHEN the Workmen's Compensation Act was passed, it was intended to be an automatic scheme of compensation for all accidents, happening in certain defined employments, occurring to the employed during their employment, unless the accident was caused by the serious and wilful misconduct of the workman injured. At one time it was seriously proposed that the assistance of lawyers should be denied to the parties to arbitration under the Act, and in no case can the applicant or respondent have the advantage of trial by jury, nor of necessity does the trial take place before a judicial functionary. The arbitration, as it is called, may indeed take place before any layman, though in practice the bulk of disputed cases seems to have been brought into the County Court—a Court which seems to possess in a peculiar degree the confidence of both applicants and respondents.

The curious form of the Act of Parliament; the confusion among lawyers and legislators between the English common-law principle of *liability* for negligence, and the German state

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insurance principle of *compensation* for accident paid to the injured as one of the working expenses of the industry; and the judicial conservatism that has discovered in the Act a modified defence of contributory negligence;—these things have destroyed the Parliamentary idea of an automatic scheme of compensation, and left a mere litigating machine dear to lawyers and dearer to their clients. Thus there is a natural, and, under the circumstances, useful multiplication of legal literature about Workmen's Compensation; new books and new editions of existing books are a necessity, and any book which assists master, workman, or arbitrator to understand his legal position is assured of a welcome.

To appreciate the utter failure of the Act as an automatic scheme, let us suppose that a master or workman were to purchase a copy of the Act of Parliament supplemented by the departmental rules and orders under the Act; with these and these only it would be impossible for him to understand in the slightest degree his position under the Act, unless his mind happened to be an exact replica of that of the majority of the Court of Appeal, and even then he would misunderstand how to initiate his claim, for on this point the House of Lords have reversed the Court of Appeal. Each day, too, the law of Workmen's Compensation depends less on the statute created

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by Parliament and more on the decisions of the Court of Appeal interpreting the Act; and as I pointed out at length in the *Fortnightly* (July 1900), the debates in Parliament, which show very clearly the intentions of the Legislature, when read side by side with the decisions upon the Act, prove how unfortunate Parliament has been in the expression of her will. There is room therefore for any book that clearly, and in a form at the same time ample and concise, publishes the Act with the added decisions of the Judges, so that the reader may have before his eyes what could otherwise only be gathered from many scattered reports. This is particularly so at the present moment when the Act has been applied to agricultural labourers, and will come before tribunals and lawyers who have hitherto never been burdened with it, but who will certainly begin to study it with practical enthusiasm and no doubt add their fair share of litigation and appeal to the surprising amount that has already been dealt with.

It is very doubtful whether any automatic compensation scheme will ever result from litigious arbitration subject to judicial appeals. A business commission, presided over perhaps by a lawyer, would be a better tribunal to carry out a proper scheme of workmen's insurance. For in interpreting an Act of Parliament, Judges are

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bound to look, not to the immediate disastrous effect of their decision, but to the general principles of the interpretation of statutes, which is a part of the law of the land. Many books have been written, and many wise judgments given, dealing with the duties of a Judge in interpreting an Act of Parliament, but very little light is thrown on the subject by this mass of judicial wisdom. The principle indeed is clear. The Act is the will of the Legislature, and the Judge is to expound the statute 'according to the intent of them that made it.' The written words alone may be used in order to find out the 'intent,' and, as in this case the written words are admittedly a hopeless tangle of confusion, the interpretation of the Act has led to results the very opposite to those foretold in the authoritative speeches of Mr. Chamberlain and Sir Matthew White Ridley in the introduction of the bill.

It seems a pity that the bill was drafted without a preamble, that picturesque statutory preface to which a Judge, whose mind is in doubt about Parliamentary intention, is allowed to turn for guidance. If the preamble had run in the words of Mr. Asquith: 'Whereas it is expedient that when a person on his own responsibility or for his own profit sets in motion agencies which create risks for others, he ought to be civilly responsible for the consequences of his own act';

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or again, had it been expressed in the more practical language of Mr. Chamberlain: 'Whereas under the present law only 12 per cent. of accidents are dealt with in the shape of compensation, and it is desirable that the other 88 per cent. should be dealt with';—if either of these preambles had been before the Court of Appeal, the bulk of their decisions must, one would think, have been different from what they have been. For so hopeless is the language of the statute, that, in dealing with it, each tribunal discovers in its provisions very much what it seeks to find. Roughly, we find that arbitrators tend to include workmen within the Act wherever possible, and the Court of Appeal tend to exclude them; arbitrators tend to an interpretation of the Act founded on a recollection of its Parliamentary promises; the Court of Appeal tend, as may be seen in these pages, to a sober, righteous, and technical interpretation, very irritating to those who care more for social reform than for the upholding of a curious legal system of interpretation. Without criticising or doubting the soundness of the general interpretations of the Court of Appeal, it is clear that in at least one case they carried their search after technicality too far.

In the case of Powell *v.* The Main Colliery Co.[1] a workman had sent in a claim as required by

[1] See p. 42 *infra*.

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Sec. 2. subs. 1. It was in writing, and stated clearly all that was essential to a claim. The arbitrator held it was sufficient. The Court of Appeal held (Lord Justice Romer dissenting) that it was not a 'claim' for compensation within the meaning of the Act; and as no 'claim' had been made within six months, the workman's rights were barred. A 'claim' meant, they said, a formal request for arbitration—in other words, the commencement of litigation. If this decision had stood, every workman, as soon as injured, would have been bound to commence proceedings, and the lawyer's part, big as it is already, would have increased tenfold. However, the House of Lords with exemplary speed restored the decision of the arbitrator, and had no difficulty in holding that a 'claim' meant any claim, and not necessarily a technical claim or request for arbitration.

So far so good. But is it not a scandal that over a simple point like this there should be disagreement among great Judges, that the money of masters and workmen should be spent, and public and private time be wasted? Probably the appeal to the House of Lords was itself in the nature of an accident; for if the applicant had been a workman in some industry less thoroughly organised, there would have been no possibility of meeting the expense of the appeal.

The case is the more unfortunate because those

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workmen who do not, like colliers, belong to the aristocracy of labour, and have not at their back money to fight these questions to the House of Lords, will naturally speculate whether, if they could have gone further in their litigation, they would have fared better.

The more one considers the wide difference between promise and performance in this particular piece of legislation, the more does it appear desirable that there should be some way of discovering the intention of Parliament more simple and trustworthy than studying the words of her enactments. A certain Rule Committee sent round to the Judges of the County Court a considerable number of new rules. Conscious of the obscurity of the new rules—or perhaps of the Judges to whom they were sent—a lengthy memorandum was sent with them, explaining in somewhat simpler language what the rules meant. This seems to be the germ of an idea which might be extended with excellent public results. If the speeches of Mr. Chamberlain and Sir Matthew White Ridley had been sent to the Judges and arbitrators who have had to interpret this Act, and the Act had been interpreted in the spirit of these speeches, the scandal of litigation with which it has been surrounded would have been impossible.

Still, it is something to have started, even in

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this disastrous way, a scheme of compensation for workmen, and there are very many cases where the common sense of master and workman has enabled them to make use of the provisions of the Act and to forego the pleasures of litigation. No doubt a time will come when the thoughts of people will again be turned to domestic affairs, and the reform of the present system of Workmen's Compensation will be taken vigorously in hand. But for a time at least we must watch this little Act of Parliament, with its few short sections, like some tiny worm spinning round itself a huge tangled web of cases and case law. Meanwhile it is the duty not only of lawyers, masters, and workmen, but of all who desire to see a wiser and better state of things, to study the result of this legislation, in books such as this, so that, when time and opportunity occur, they may be ready to grapple with the evil state of things that has sprung up, and replace it by something healthier and better.

EDWARD A. PARRY.

HOLLAND HOUSE, WITHINGTON,
August 1900.

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INTRODUCTION TO NEW EDITION

Mr. Elliott has shown me the proofs of the new edition of his Workmen's Compensation Acts, and asked me to add a postscript to the Introduction I wrote last year. Reading this over, I do not think I have anything to alter in my former Introduction. Indeed, I am more convinced than ever, that if the intention of the Legislature is to be carried out, it is necessary to withdraw the working of the insurance scheme as far as may be from the hands of lawyers and judges, in order that it may be of permanent and real value to the community. Some of the great railway companies and other large employers of labour have managed to do this for themselves to the great advantage of those they employ, but the fact remains that there is a great deal of litigation continuing, which, as long as the Acts are in their present form, will and must continue. As long as this is so, new editions of books bearing on the subject are a necessity, and it is really surprising, even to me, familiar with the absurdities of the Act, to find how large a portion of this volume

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has had to be re-written in twelve months. It is startling to be reminded that there have been six appeals to the House of Lords. These have been in nearly every case upon important points, and in five cases out of the six the House of Lords took a different view of the statute from that of the Court of Appeal. When you find lawyers of the eminence and learning of these judges differing as to the right meaning of the words of this Act, what chance have masters and men of ascertaining their duties and rights without the assistance of lawyers; what chance, indeed, have lawyers of giving their clients sane and certain advice, or foreseeing with any clear vision the results of litigation? The cost of all this litigation, though doubtless borne in most cases by Trades Unions and Insurance Companies, is a heavy tax on labour, and must add considerably to the insurers' premiums.

It must be remembered, too, that many important points have never gone to the House of Lords, and that in Scotland cases have been decided quite differently from what they have in England, from which decisions there is no appeal to the House of Lords. Scotch cases, House of Lords cases, Court of Appeal cases, and even decisions of the Judges of County Courts, are hurled at the unfortunate Arbitrator; all these decisions are reported in varying language

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in different reports, and a glance through these pages will enable one to understand the nature of an Arbitrator's task, who has not only to master the facts of the case, but also to try and understand what the law is at the particular moment that the case is being tried, in order that he may justly administer it. The only suggestion of reform that has been made as yet, is to transfer the appeals to Divisional Courts of perhaps three Judges instead of two, whose decisions are to be final. With every respect to the Judges of the High Court, it is to be doubted whether they would succeed any better than the Lords Justices in interpreting the Act in the spirit that the House of Lords has interpreted it, namely, by endeavouring to include workmen in its provisions, rather than seeking to exclude them, and to broaden rather than narrow the system of insurance. The Judges of the High Court have at present never had to deal with the Act in any shape whatever, so that they would bring to the task wholly unprejudiced minds, but it is doubtful whether at this stage of the history of the Act its review by a tribunal of constantly changing individuals, judges who are unfamiliar with its provisions and their existing interpretations, would be of benefit in bringing about that certainty which is so desirable in all interests.

It remains to be seen whether this Appeals

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Bill will be re-introduced. Meanwhile, for the unfortunate Arbitrator, the worried insurance man, the suffering workman, the still more suffering master, and the conscientious but happy lawyer, there is nothing to be done but to battle with the stream of leading cases until they master the stream, or its waters overwhelm them.

EDWARD A. PARRY.

September 1901.

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WORKMEN'S COMPENSATION ACT, 1897

(60 and 61 VICT. c. 37)

An Act to amend the Law with respect to Compensation to Workmen for accidental Injuries suffered in the course of their Employment.

Sec. 1. (1.) Liability of certain employers to workmen for injuries.

1.—(1.) If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act.

EMPLOYMENT.—The employments to which this Act applies are specified in Sec. 7 (1), and they are further defined in Sec. 7 (2). See Notes to Sec. 7, p. 89.

INJURY BY ACCIDENT.—The injury must be caused by accident. There is no definition of accident in the Act, but from three decisions given by the Court of Appeal, it has been laid down that the word 'accident,' as used in this Act, involves the idea of something fortuitous and unexpected. See *Hensey* v. *White* ([1900] 1 Q.B. 481; 81 L.T.R. 767; 16 T.L.R. 64), *Lloyd* v. *Sugg and Co.* ([1900] 1 Q.B. 486; 81 L.T.R. 768; 16 T.L.R. 65), and *Walker* v. *Lilleshall Coal Co., Ltd.* ([1900] 1 Q.B. 488; 81 L.T.R. 769; 16 T.L.R. 108).

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Sec. 1 (1.) In *Hensey* v. *White* (*supra*) the application for compensation was made on behalf of the widow of a workman. The deceased had been a cabinetmaker working for the respondent, and it was part of his duty to start a gas-engine, which was done by turning a wheel. On the day of the injury he was endeavouring to set the wheel in motion, but it was stiff, owing to disuse during the Christmas holidays, and at first it could not be moved. There were others assisting him, and after some attempts, the men had just succeeded in moving it, when the deceased put his hand to his stomach, and almost immediately began to vomit blood, which he continued to do until he died. A post-mortem examination revealed the fact, that certain of his internal organs were not in the natural state in which those of a sound and healthy man should be, and, though conflicting medical evidence was given before the County Court Judge, he found that death was due to disease, but that it was possibly accelerated by the strain in endeavouring to move the wheel. He therefore gave judgment for the respondent, on the ground that the death of the deceased was not the result of an accident within the meaning of the Act.

The Court of Appeal refused to disturb this judgment, because the element of accident was entirely wanting. Collins L.J., in the course of his judgment, said :—'In the ordinary course of his work, he was applying more than ordinary pressure to the wheel, and it is said that the injury which he received while doing so was the result of an accident; what he was doing, however, he was doing deliberately and in the ordinary course of his work, and that which happened was in no sense a fortuitous event. . . . In the present case there is an entire lack of the fortuitous element.' But see *Timmins* v. *Leeds Forge Co., Ltd.*, on p. 4.

In *Roper* v. *Greenwood and Sons* (83 L.T.R. 471) the applicant was employed as a box-maker, and on the day of the injury the boxes upon which she had to work were of a larger size and heavier than usual. When she had completed six boxes and was lifting up another, she strained herself and was injured. It was held that there was no accident, as there was nothing fortuitous or unforeseen.

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In *Lloyd* v. *Sugg and Co.* (*supra*) the applicant, a smith in the employ of the respondents, was holding a flatter, the flat head of which was resting on an anvil and was being beaten by a boy with a hammer. The boy, however, missed his aim and hit the round rod of the flatter instead of its flat head, thereby jarring the applicant's hand, which was considerably injured. From medical evidence it appeared that the applicant had for some time suffered from gout, and that the swollen condition of the hand was due to gout brought on by the jar, the result of the jar having been to excite the gout in the system. The County Court Judge awarded compensation, but on appeal, it was contended that the injury had not been caused by accident; that, in any event, it had not been caused solely by accident, but by an accident in conjunction with some other operating cause. Sec. 1. (1.)

The Court of Appeal rejected this argument, and held that the injury was caused by an accident, namely, by the boy with the hammer hitting the rod of the flatter instead of hitting its flat end. The contention, that the injury arising from the jar would not have been so great but for the gouty diathesis, was immaterial, as the gouty diathesis was only material as to the amount of the injury.

In *Walker* v. *Lilleshall Coal Co., Ltd.* (*supra*), the applicant, who had previously blistered one of his fingers, was engaged at working at the steam-pipe joints of a machine. He had with him a labourer, whose duty it was to put red lead and oil upon the joints of the pipes, and the applicant then screwed the different joints together. Whilst doing so, the red lead and oil came in contact with his blistered finger, and seriously injured it. The County Court Judge was of opinion that there had been no accident, and this decision was upheld on appeal, on the ground that the applicant was at the time working in the ordinary way, with the usual materials and appliances, and there was no element of accident in the case.

In *Thompson* v. *Ashington Coal Co., Ltd.* (17 T.L.R. 345), a collier was employed in working in a narrow seam of coal. There was a quantity of small coal about, and he had to work very frequently on his knees. He complained for about a

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Sec. 1. (1.) fortnight of a pain in his knee, and at the end of that time his wife examined it and found a piece of coal under the skin. Blood poisoning set in and the man died. The County Court Judge came to the conclusion that the piece of coal got down the man's trousers while he was at work and worked its way into his knee, and he held that this was an accident. In this holding he was supported by the Court of Appeal.

The circumstances in this case appear to be almost identical with those in *Walker* v. *Lilleshall Coal Co.* (*supra*), where they were held not to constitute an accident. The only distinction there appears to be between the two cases is, that in *Walker* v. *Lilleshall Coal Co.* the man was aware of the risk and had told the foreman of the condition of his blistered finger before he commenced the work, and hence there was wanting the fortuitous and unexpected element.

In *Timmins* v. *Leeds Forge Co., Ltd.* (83 L.T.R. 120; 16 T.L.R. 521), the applicant was a labourer in the employ of the respondents, and was engaged in moving piles of timber. On the day of the accident the planks were all frozen together, there having been a frost during the night; and the lower the applicant got in the stack of timber, the harder the planks stuck together. Accordingly, when he tried to lift one of the lower planks he ruptured himself, owing to the difficulty of lifting it, on account of its being frozen fast to the other planks. The County Court Judge found that the injury was caused by accident, and an appeal to the Court of Appeal failed, on the ground that there was evidence upon which the County Court Judge could find that the injury was caused by something fortuitous and unexpected, namely, by reason of the planks sticking together. But see *Hensey* v. *White* on p. 2.

MUST THE ACCIDENT BE EXTERNAL?—The head note to the report of the cases of *Hensey* v. *White*; *Lloyd* v. *Sugg and Co.*; and *Walker* v. *Lilleshall Coal Co., Ltd.* (*supra*) in the *Law Reports* is as follows:—

'Where a workman suffers injury while doing his ordinary work in his ordinary way, and the primary and efficient cause of the injury is his diseased or impaired physical condition at the time, the injury is not caused by accident within the meaning of the Act. When, however, injury is caused to a

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workman by some fortuitous and external event, it is caused by accident within the meaning of the Act, although the injury may be aggravated by his physical condition at the time of the accident.' Sec. 1. (1.)

It would appear from this that, to constitute an 'accident,' the injury must not only be caused by some 'fortuitous' event, but also by some 'external' event. If this be so, some of the accidents of most common occurrence, such as straining a muscle through slipping will not be 'accidents' within the meaning of the Act. This appears to be too narrow an interpretation of the word 'accident,' and the question arises whether the inclusion of the word 'external' in the head note can be justified. If it was introduced so as to exclude cases resulting from disease alone, no fault can be found with it. But if the effect of its introduction is to exclude all accidents which are not caused by external events, then its introduction does not appear to be justified by any of the judgments delivered in those cases. If, again, it was the intention of the Court of Appeal to lay down that external accidents only are within the Act, it is strange that neither the *Law Times*, the *Law Journal*, nor the *Weekly Reporter* make any mention of the word 'external' in their reports of these cases. This was pointed out by the Judge of the Manchester County Court in *Lee Boardman* v. *Scott and Whitworth* (111 Law Times 90), where a man in a normal state of health tore several fibres of the muscles of his back whilst lifting a beam of about 100 lb. weight. His Honour held that this was an 'accident' because it was something 'fortuitous,' and he expressly found that it was not 'external'; but as he did not agree that the Court of Appeal had laid down that external accidents only were within the Act, he made an award in favour of the applicant. The case is at present under appeal, and when it is heard, it will no doubt be definitely laid down whether or not an accident must be external as well as fortuitous. But see *Perry* v. *Baker and Son* (111 Law Times 209) where the Judge of the Marylebone County Court felt himself bound by the decisions above referred to, to hold that to come within the meaning of the Act an 'accident' must be from some external cause resulting directly in injury.

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Sec. 1. (1.) **INJURY THROUGH BREATHING NOXIOUS GASES.** — The question as to whether injuries resulting from working at dangerous or unhealthy trades are within the operation of the Act is discussed in 105 *Law Times* on p. 169, from which the following extract is taken: 'Can damages for "phossy jaw" be recovered under the new Act? The proper view seems to be that, if a man is unable to stand a particular occupation and breaks down where another would be unaffected, this is no accident. It is the effect of the work which was undertaken; there has been no occurrence out of the ordinary. But if injury results—not necessarily by violence, but from some exceptional or unforeseen cause—*e.g.* shock to the system resulting from fright at a sudden imminent catastrophe (see *Pugh* v. *London, Brighton, and South Coast Railway Co.* [1896] 2 Q.B. 248, 251; 74 L.T.R. 724), whether caused by personal negligence or wilful act, or by the happening of some event against which no reasonable foresight could have guarded—that is an accidental injury for which compensation is directly provided in the new Act, if it takes place on, in, or about any of the employments specified therein. According to the Act, "phossy jaw," in so far as it is inseparable from the employment where it is found to occur, is not a personal injury caused by accident, and the same may be said of other injuries happening in dangerous or unhealthy trades, and not wholly preventible by the exercise of all possible care. . . . If the injury is of a kind which the workman knew, when he undertook the work, was likely to happen by reason of the very nature of the employment, and he has succumbed through ill-health or weakness of constitution produced by the work, such injury cannot be regarded as caused by accident, and therefore is not a subject for compensation under the new Act. The employer is not, in fact, made an insurer against the risks of a trade which is in its nature injurious to health.'

The principle laid down in the above article has been often followed. In *Williams* v. *Duncan*, the Judge of the Southwark County Court found that a workman, who had been incapacitated for six weeks by an attack of colic through lead-poisoning, had not suffered 'personal injury by accident.' In *Booth* v. *Leeds Forge Co.* a man was employed as gas-blower

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at a forge, and was 'gassed' and died from poisoning. The County Court Judge said he had not the slightest doubt that the man's death was due to having inhaled water-gas for a number of years, but the cause of his death could not be accounted an accident according to the terms of the Act. Sec. 1. (1.)

From a consideration of the above cases, it will be seen that, for an injury to be caused by accident, there must be something exceptional or unforeseen in the cause of the injury—there must be an occurrence out of the ordinary course. Under the Employer's Liability Act[1] some element of negligence was always necessary to render the employer liable; but under the new Act this is unnecessary, and the employer becomes liable for any injury caused by accident—even inevitable accident—provided it arose out of and in the course of the employment.

IS EVERY ACCIDENT WITHIN THE ACT?—Supposing a man, whilst engaged in his employment, was struck by lightning and killed. Would that be an accident within the meaning of the Act? It will be observed that the only accident referred to in this sub-section is an accident 'arising out of and in the course of the employment.' Could it be said that a man who was killed by lightning was killed by 'accident arising out of and in the course of his employment'? It is submitted not. The accident would occur whilst he was in the course of his employment, but it could hardly be said to arise out of it. It might be different if the workman was engaged in fixing a lightning conductor at the time that he was struck, or if he was employed near a machine which attracted the lightning. It could then be argued with reason that the accident arose 'out of' as well as 'in the course of' the workman's employment, on the ground that it might not have happened if he had not been engaged in that particular kind of work. But apart from special circumstances of that kind, an accident which occurs through a manifestation of the laws of Nature, is not such an accident as is contemplated by the Act.

ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT.—The accident must arise both out of and in the course of the employment—both conditions are necessary in

[1] 43 and 44 Vict. c. 42.

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Sec. 1. (1.) order that the employer may be made liable. To obtain compensation it is necessary to show

(1) That the workman was engaged in an employment to which the Act applies; and

(2) That the accident which caused the injury was one arising out of and in the course of such employment.

Both these facts must be established, and the onus of proving them lies on the applicant, though it appears from the decision given in *M'Nicholas* v. *Dawson* ([1899] 1 Q.B. 773; 80 L.T.R. 317; 15 T.L.R. 242), that very slight evidence is sufficient to raise the presumption that the accident arose out of and in the course of the employment, where there is no evidence to the contrary. In this case a workman was employed to look after an engine in a shed. The engine was connected with a mortar-pan outside the shed, in which mortar was mixed for the purpose of being used in the erection of a building near at hand. Early one morning he went to his work and started the engine, and two minutes after he had done so, he was found crushed to death. No one saw how the accident happened, but the evidence showed that it was the duty of the deceased, after he had started the engine, to go to the mortar-pan, the proper way to go being by a main door. There was also a small door opposite the main one, which was sometimes used for ventilation, but to go to the small door it would be necessary to creep under a revolving shaft, and the deceased had been forbidden to go out of the shed by this small door. The oil can was found on a shelf where it was kept when not in use, showing that the deceased could not have been oiling the engine at the time of the accident. The County Court Judge held that, though the accident probably arose in the course of the employment of the deceased, it was left absolutely uncertain whether it arose 'out of' the employment; and as the burden of proof as to this was on the applicant, he gave judgment for the employers.

The Court of Appeal allowed an appeal, on the ground that there was evidence fit to be submitted to a jury that the accident arose 'out of and in the course of the employment.' 'The highest that can be put against the deceased,' said

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Collins L.J., 'is that he was going out of the shed by a dangerous way, and met with his death while trying to get under the shaft of the engine. It was as much his duty to get out of the shed as it was to go into it, and both would be done in the course of his employment.' Sec. 1. (1.)

A man does not cease to be in the course of his employment merely because he takes a wrong or dangerous method of doing what might be done safely if it was to be done at all (*Durham* v. *Brown Brothers and Co., Ltd.*, 36 S.L.R. 190).

In *Smith* v. *Lancashire and Yorkshire Railway Co.* ([1899] 1 Q.B. 141; 79 L.T.R. 633; 15 T.L.R. 64), a man was employed as a ticket-collector by the respondents. When he had finished collecting the tickets, he got upon the footboard of a train after it had started, not for any object of his employment, but to converse with a friend who was a passenger in the train, and met with an accident which caused his death. It was held that the accident did not arise 'out of' his employment within the meaning of this sub-section, on the ground that, at the time of the accident, all the deceased had to do for the Company, arising out of his employment, had been done and completely discharged. The Court did not decide whether the accident arose 'in the course of' the employment, the first finding having rendered this unnecessary. See the Scotch case of *Callaghan* v. *Maxwell* (37 S.L.R. 313.)

In *Lowe* v. *Pearson* ([1899] 1 Q.B. 261; 79 L.T.R. 654; 15 T.L.R. 124), it was decided that where a boy, employed in a pottery to make clay balls and hand them to a woman who worked at a moulding machine, meddled with the machinery during the temporary absence of the woman, in spite of having been expressly ordered not to interfere with it in any way, and was thereby injured, the accident did not arise 'out of and in the course of' his employment. The Court refrained from expressing any opinion on 'the case of a servant, while in his master's employ, doing upon an emergency something outside the scope of what he was employed to do in the interests of his master,' until such a case arose. Such a case did soon afterwards come before the Court. (See *Rees* v. *Thomas*, p. 11.)

But it is not every breach of a master's orders that will have

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Sec. 1. (1.) the effect of terminating the servant's employment, so as to prevent an accident, that happens owing to the breach of his orders, from arising out of and in the course of his employment. For instance, in *Whitehead* v. *Reader* ([1901] 2 K.B. 48; 84 L.T.R. 514; 17 T.L.R. 387) a workman was employed as a carpenter, part of his duties being to sharpen his tools on a grindstone which was rotated by a band driven by machinery. He had received orders not to touch the machinery. The band that rotated the grindstone having slipped, he endeavoured to replace it, and in doing so was injured. On a claim for compensation, the County Court Judge found that the accident arose out of and in the course of the employment of the workman, and made an award in his favour.

Before the Court of Appeal it was contended that the case was governed by *Lowe* v. *Pearson* (*supra*), but the Court distinguished it from that case, and held that the disobedience of the master's order did not of itself prevent the act of the workman from being an act done in the course of his employment, and that, as it had not been shown that the replacing of the band was an act on the part of the workman so remote from his ordinary duties that it could not fairly be said to be one arising out of and in the course of his employment, the award must stand.

Collins L.J. felt some difficulty in coming to this conclusion, because he could not arrive at a clear opinion as to what it was that the County Court Judge had found in fact. In the course of his judgment he stated the law to be as follows:—'We have to get back to the orders emanating from the master to see what is the sphere of employment of the workman, and it must be competent for the master to limit that sphere. If the servant acting *within the sphere of his employment* violates the order of his master, the latter is responsible. It is, however, obvious that a workman cannot travel *out of the sphere of his employment* without the order of his employer to do so; and if he does travel out of the sphere of his employment without such an order, his acts do not make the master liable. *In the present case, if the two spheres of employment had been distinctly separated and defined—namely the grinding of the tools and the skilled labour of managing the machinery—*

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and the applicant's employment had been limited to the former, and if, while acting in breach of the order limiting his employment, he had met with the accident, the master would not have been liable.' See also the Scotch case of *M'Quibban* v. *Menzies* (37 S.L.R. 526). Sec. 1. (1.)

A good illustration of an accident arising 'in the course' of a workman's employment but not 'out of' it, is found in the Scotch case of *The London and Glagow Engineering and Iron Shipbuilding Co., Ltd.*, v. *Falconer* (38 S.L.R. 381), where a blacksmith, whilst working at his anvil, was knocked over and injured by two of his fellow-workmen who were larking about instead of attending to their work. It was held that under such circumstances the accident could not be said to arise 'out of' the man's employment.

In *Harrison* v. *Whitaker Brothers* (16 T.L.R. 108), a boy was in the employment of a firm of contractors who were engaged in constructing a dock, for the purpose of which they used a railway line. On the day of the accident he was engaged in greasing the wheels and axles of the railway trucks, and having greased all the trucks that were ready for him, he had to wait for others. There was a fire not far away from the place where he had greased the trucks, and he sat down on a lever to warm himself by it. While there, he saw an engine with trucks coming along, and thinking the points were against it, he began to pull the lever to open them, when the engine came up and he was thrown against it and injured. The County Court Judge held that the accident arose 'out of and in the course of' the boy's employment, and the Court of Appeal said that he was justified in so finding.

ACCIDENT ARISING FROM ACT DONE ON AN EMERGENCY.—In *Rees* v. *Thomas* ([1899] 1 Q.B. 1015; 80 L.T.R. 578; 15 T.L.R. 301), the deceased was a fireman in the employ of the respondents, who were mine-owners, part of his duties being to examine and report upon the condition of the mine, and to make his report at the office, which was about half a mile from the pit's mouth. On the morning of the accident, while going to make his report, he got on a truck which was being drawn by a horse on a tram line in the direction of the office. This was a breach of one of the rules of the mine,

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Sec. 1. (I.) which provided that no workman should ride on full trucks on the tram line. While the deceased was so riding, the horse bolted; he jumped down, and in running to stop the horse, fell and was killed.

The Court of Appeal agreed with the County Court Judge that the deceased had not been guilty of serious and wilful misconduct, and held that the accident arose 'out of and in the course of the employment.' Smith L.J. said:—'It is said that it did not arise out of his employment, because it was the result of a voluntary act on his part, that is, of his attempt to stop the horse. But the deceased was acting in the interest of his master in an emergency which suddenly arose, and in which any one would, I should think, have tried to do the same thing. I think therefore that the accident arose out of his employment; and there is no doubt that it arose in the course of it, as he was taking the report to the office in the ordinary course of his duty.'

The case of *Matthews* v. *Bedworth Brick, Tile and Timber Co.* (106 Law Times 485) came before the Judge of the Nuneaton County Court. The deceased was at work for the respondent company with Burden, a foreman, and a man named Moran. They were engaged in cleaning out an old shaft, and early one morning Moran was the first to descend. He came in contact with choke damp, was overpowered, and fell from the skip in which he was descending to the bottom. On the deceased learning this, he got into the skip with Burden, who however warned him of the danger, and began to descend to save Moran. They met with the same experience; the deceased was overpowered, fell from the skip, and was killed, while the other two men were rescued. On these facts it was held that the accident arose out of and in the course of the employment, on the ground that, though the deceased was not acting under any direct order to do what he did, he acted under a reasonable belief that his employers would have wished him to do it, and it was done not only for the benefit of the man whom he endeavoured to save, but also for the benefit of his employers. See also the Scotch cases of *M'Quibban* v. *Menzies* (37 S.L.R. 526) and *Devine* v. *Caledonian Railway Co.* (36 S.L.R. 877).

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GOING TO AND RETURNING FROM WORK.—A workman's employment begins, in the ordinary course, when the time has arrived and when the locality has been reached at which he is employed; that is to say, that it is no part of the contract of employment that the employment should include the time taken in getting to and from the work (*Holness* v. *Mackay and Davis* [1899] 2 Q.B. 319; 80 L.T.R. 831; 15 T.L.R. 351). In this case a ganger was employed by contractors in widening a railway siding. His day's work commenced at 7 A.M., and on the morning of the accident, while on his way to work, he was killed by an express train on the main line a few minutes before seven o'clock. There were two ways by which he could reach the siding, one across and the other along the main line, but there was no evidence as to the way by which the deceased got on the line that morning. Sec. 1. (1.)

It was held by Smith and Vaughan Williams L.JJ. (Romer L.J. dissenting) that the accident did not arise 'out of and in the course of the employment,' since it happened before the time when his work was to commence, and before he reached the place where he was employed. It was laid down that the contractors owed no duty to the workman while proceeding to his work, and generally, that a workman who is injured in a place not under his employer's control, while going to or returning from his work, is not within the provisions of the Act.

A distinction was drawn between cases where the employer has control over the place which the workman has to pass in order to get to his work, and cases where he has not. It was suggested that, if a man employed in a large quarry were killed whilst going to his work in a particular portion of it, or if a man, while going to his work on the upper floor of a large factory, were killed on the lower floor of the factory, the decisions would probably be that the accidents in these cases did arise 'out of and in the course of the employment.'

This view is strengthened by the decision given in *Holmes* v. *Great Northern Railway Co.* ([1900] 2 Q.B. 409; 83 L.T.R. 44; 16 T.L.R. 412). The deceased was an engine-cleaner in the employment of the Railway Company, and had for some time been engaged on work at King's Cross. A new engine-

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Sec. 1. (1.) shed having been erected at Hornsey, about four miles from King's Cross, the deceased was directed by his foreman to go there for the purpose of cleaning engines in the new shed. On the morning of the accident he and some other engine-cleaners proceeded from King's Cross to Hornsey by one of the Company's trains, and reached the latter place at 5.45 A.M., their time for beginning work being 6 A.M. None of them had tickets, and it appeared that they were not expected to take tickets. On arriving at Hornsey the men proceeded to cross the lines of railway, when an express caught the deceased, and injured him so much that he died the following day.

It was contended for the Company that the injury to the deceased did not arise 'out of and in the course of' his employment, and *Holness* v. *Mackay and Davis* (*ante*, p. 13) was relied on to show that the employment did not commence until the hour of actual work had arrived, and the deceased was upon that part of his employer's premises where such work was to be performed. This contention, however, was not accepted, and the Court of Appeal upheld the decision of the County Court Judge, that the accident arose 'out of and in the course of' the deceased man's employment. Smith L.J. said it seemed to him that there was an implied contract between the masters and the man, that if he would get into the train at King's Cross, they would take him by their line to his work and bring him back again. There was a difference between the beginning of employment and the beginning of work, and the employment of the deceased commenced when he got in the train to be conveyed to his work. See also *Fitzpatrick* v. *Hindley Field Colliery Co.* (110 Law Times 548).

In *Gibson* v. *Wilson* (38 S.L.R. 450) it was held that injury sustained by a workman while climbing over a school-yard railing to get across to his work at the church, the key of the churchyard gate having failed to open the lock, did not arise out of and in the course of his employment.

In *Davies* v. *Rhymney Iron Co. Ltd.* (16 T.L.R. 329), the injured workman was a collier in the employ of the respondents, who owned a line of railway, about one and a quarter miles in length from their colliery, and they ran a train to

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take the colliers from their work in the colliery to their homes. The colliers did not pay for the use of the train, and it was at their option whether they used it or not. The applicant was on the day of the accident going home by the train, and when alighting from it at a point about three-quarters of a mile from the colliery he fell and was injured. It was held that the accident did not arise 'out of and in the course of his employment,' as he was under no duty to the respondents when it happened. But see *Holmes* v. *Great Northern Railway Co.* on p. 13. Sec. 1. (1.)

On the other hand, in *Todd* v. *Caledonian Railway Co.* (36 S.L.R. 784), an engine-driver, who had been released from active duty by another servant of the Company, proceeded along the line to report himself at a goods shed at a station, and whilst on his way was killed by a train. It was argued for the Company, that the man's employment ceased when he handed over his engine to another driver, but it was held that the accident arose 'out of and in the course of' his employment on the ground that he was walking along the Company's line for the purpose of reaching a particular point where it was his duty to be.

A WORKMAN.—For definition of 'workman' see Sec. 7 (2) and notes thereon at p. 150; also Sec. 8 (1).

EMPLOYER.—For definition of 'employer' see Sec. 7 (2) and notes thereon at p. 149; also Sec. 7 (1) and notes thereon at p. 88.

The word 'employer' as used here is misleading. In all cases it is the 'undertaker' who is liable, and not the 'employer.' Of course the undertaker may also be the employer, but in many cases the undertaker will be liable when he is not the employer, and when the employer himself is not liable at all. In *Cass* v. *Butler* ([1900] 1 Q.B. 777; 82 L.T.R. 182; 16 T.L.R. 227) an electrical station, which was over thirty feet in height, was being constructed by means of a scaffolding for the Leeds Corporation by a contractor, who had contracted for the whole of the building. The contractor sublet to a sub-contractor the painting of the building. A workman in the service of the sub-contractor met with a fatal accident, while engaged in painting the interior of the

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Sec. 1. (1.) roof. It was held that the sub-contractor was not an 'undertaker' within the meaning of Sec. 7, and was therefore not liable under the Act to pay compensation to the workman's widow. The sub-contractor was undoubtedly the deceased's 'employer,' but he was not liable because he was not an 'undertaker.' The claim should have been made against the 'undertaker.' Hence for the word 'employer' as used in this Sec. there should be substituted the word 'undertaker.' See note on 'undertakers' under Sec. 7 (1) at p. 88.

SUBJECT AS HEREINAFTER MENTIONED.—The chief provisoes referred to are the following :—

(1) That the injury has disabled the workman for a period of at least two weeks, from earning full wages at the work at which he was employed (Sec. 1 (2) (*a*)).

(2) That the workman has not already obtained damages from his employer in respect of the injury, independently of this Act (Sec. 1 (2) (*b*)).

(3) That the injury is not attributable to the serious and wilful misconduct of the workman (Sec. 1 (2) (*c*)).

(4) That the workman has given notice of the injury and claimed compensation within the prescribed time (Sec. 2).

(5) That the workman has not contracted out of the Act (Sec. 3).

(6) That the workman has not already recovered damages from a stranger in respect of the injuries (Sec. 6).

(7) That the workman has, if requested by his employer, submitted himself to a medical examination after having given notice of the accident (Schedule I. (3)).

COMPENSATION.—The compensation given by this Act differs altogether from damages recoverable by a workman from his employer under the Employer's Liability Act,[1] or at common law. Damages are only recoverable when there has been fault or negligence on the part of the employer, his agents, or servants, whereas by this Act an undertaker is made liable to pay compensation, although neither he, nor any person for whose acts he is responsible, has been negligent or in default in any way whatever.

[1] 43 and 44 Vict. c. 42.

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(2.) Provided that:— Sec. 1 (2) (a)

(*a*) The employer shall not be liable under this Act in respect of any injury which does not disable the workman for a period of at least two weeks from earning full wages at the work at which he was employed.

DISABLEMENT FOR TWO WEEKS.—Owing to the use of the words 'full wages,' it is not clear from this sub-section that a workman must be incapacitated for at least two weeks, for if a man were absent from work, even for a day, through having received a slight injury, that injury would have disabled the workman from earning *full* wages for a period of two weeks. But the provision in Schedule I. (1) (*b*), that there shall be a weekly payment 'after the second week,' shows clearly that it is the intention of the Act, that no compensation whatever shall be paid for two weeks, but that the weekly payment awarded shall commence after the expiration of the second week from the time of the incapacity. See note under Schedule I. (1) (*b*) at p. 174.

The provision, that the injury must incapacitate the workman from earning his wages for two weeks, to enable him to have a right to compensation, though a useful one, will exclude from the benefits of the Act many workmen who are injured. This is shown by the following extract from the Report of the Chief Registrar of Friendly Societies for the year ending 1899. Speaking of the returns made under Schemes certified by the Registrar under Sec. 3, the Report proceeds:—

'In 22 returns information is given from which a comparison can be made between the amounts of payments made during incapacity, and the maximum amount that would have been payable under the Act, from which it appears that the actual payments are nearly twice the amount of that maximum. This is largely accounted for by the provision made for the first two weeks of incapacity. *The cases in which the duration of incapacity was two weeks and under were more than half of the whole number.*'

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Sec. 1. (2.) (*a*) **FULL WAGES.**—To make the employer liable, the workman must be disabled from earning 'full wages' for two weeks. This does not mean that he must be altogether prevented from doing any work during that period. If, before the expiration of two weeks, he is able to return to his work, but owing to the injury is not, after two weeks, able to earn as much as before the injury, he can still obtain compensation.

The wages must also be *earned*; it is not enough that they are *paid*, as the test of the right of a workman to a weekly payment, in respect to partial disablement for work, is his wage-earning capacity after the accident. Even where a workman is receiving the same wages after as before the accident, if the Arbitrator is of opinion that he is not in fact *earning* them, he will either award a nominal amount to be paid weekly, so as to preserve to the workman his right to have the weekly payment reviewed under Schedule I. (12), or make a declaration of the liability of the employer, leaving the amount and duration of the compensation to be fixed on an application under the same clause of the same Schedule (see *Irons* v. *Davis and Timmins, Ltd.* [1899] 2 Q.B. 330; 80 L.T.R. 673; and *Chandler* v. *Smith* [1899] 2 Q.B. 506; 81 L.T.R. 317; 15 T.L.R. 480; also note to Schedule I. (12), p. 206). If the Court had not this power, workmen might be altogether deprived of their rights under the Act by their employers. Employers might take their injured workmen back into their employ as soon as they were able to do any work, and pay them the same wages as they received before the accident. After continuing to do this for six months, they might dismiss them, when it would be too late for them to make a claim for compensation.

The meaning of the sub-section was well explained by Smith L.J. in his judgment in *Chandler* v. *Smith* (*supra*). 'The meaning of Sec. 1 (2) (*a*),' he said, 'in my judgment is that if the accident be of such a nature that the man is by law entitled, during the two weeks immediately following the accident, to recover full wages from his master at the work at which he was employed before the accident, then such an accident is not to give rise to a claim by the workman

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against his master under the Act. . . . If the master out of feelings of compassion and generosity, which happily is often the case, continues to pay the full wages though not under legal obligation to do so, that does not bring the case within the sub-section.' Sec. 1. (2.)(c)

AT THE WORK AT WHICH HE WAS EMPLOYED.—From the decision in *Chandler* v. *Smith* ([1899] 2 Q.B. 506; 81 L.T.R. 317; 15 T.L.R. 480), it would appear that, for the employer to escape liability, the workman must be able to earn full wages at the same work which at the time of the accident he was employed to do, though this was not definitely laid down by the Court. The facts in the case were these. A foreman of a weaving department was employed principally in supervising the hands, but also used to set up and adjust the machines. He met with an accident which incapacitated him from doing this manual labour, and his work was afterwards confined to the supervision of the hands, though his employers continued to pay him wages at the same rate after as before the accident. The Court of Appeal, however, decided that there was no evidence that the payment of the full wages was not an act of grace on the part of the employers, and it was held that, as the applicant had been prevented by reason of the accident from doing a substantial part of the work at which he had previously earned his wages, he had been disabled for two weeks from earning 'full wages at the work at which he was employed,' but that, as he had up to now suffered no pecuniary loss, the proper course was to make a declaration of the liability of the employer, leaving the amount and duration of compensation to be fixed upon an application under Schedule I. (12).

Though in *Chandler* v. *Smith* (*supra*) the Court in effect adopted the principle that the incapacity for work in respect of which compensation is payable must be an incapacity for that class of work which the workman was doing at the time of the accident, still a workman who, though prevented from earning full wages at his former class of work, is nevertheless able to earn full wages in another capacity, cannot actually recover compensation. Schedule I. (2) provides that 'in fixing the amount of weekly payment, regard shall be had to the

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Sec. 1. (2.) (a) difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident.' This implies that the workman is to receive nothing unless there is a difference between the average weekly earnings before the accident and the average weekly earnings after the accident, quite irrespective of the work in which he is engaged. For instance, in *Pomphrey* v. *Southwark Press* ([1901] 1 K.B. 86; 83 L.T.R. 468; 17 T.L.R. 53), an apprentice obtained an award for the payment of 3s. 6d. weekly for an injury to his right hand which prevented his working as a skilled artisan. Subsequently he was employed as a labourer by the same employer, his wages being larger than they were before the accident. On an application by the employers for the review and termination of the weekly payment, the County Court Judge dismissed the application, but on appeal it was held that the test to be applied was the difference between the amount of the average earnings before the accident and the average amount which the workman is able to earn after the accident; that, as in this case the workman was earning as much as he was earning before the accident, the County Court Judge was wrong in refusing to review the weekly payments; but that the weekly payments should be continued at a nominal amount, in order to preserve the right of the applicant to make any further application that might become necessary. It would appear, therefore, that in all cases where the workman is earning as much after as before the accident, though such earnings are not earned 'at the work at which he was employed,' the proper course is either to make a declaration of the liability of the employer as in *Chandler* v. *Smith* (*supra*) or to award a nominal sum of 1d. a week as in *Irons* v. *Davis and Timmins, Ltd.* (*supra*). This course has also been adopted in Scotland (*Freeland* v. *Macfarlane, Lang and Co.*, 37 S.L.R. 599).

Whether the injury disabled the workman from earning full wages for two weeks, is a question of fact to be decided by the Arbitrator.

Sec. 1. (2.) (b) (*b*) When the injury was caused by the personal negligence or wilful act of the employer,

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or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act, or take the same proceedings as were open to him before the commencement of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid. Sec. 1. (2.)(b)

The effect of this sub-section is to preserve to the workman his existing rights against his employer, whether at common law, under Lord Campbell's Act,[1] or under the Employer's Liability Act.[2] When the injury has been caused by the personal negligence or wilful act of the employer, or of some person for whose act or default he is responsible, the workman has the alternative of proceeding either under this Act, or of taking such proceedings as were open to him before the commencement of this Act, but in all other cases this sub-section limits his remedy to this Act.

THE WORKMAN'S OPTION.—By this sub-section and by Sec. 6, the workman 'may, at his option,' proceed under this Act or independently of it. If the workman be alive, there is no difficulty, as the option is clearly his. But if the workman be dead, who is then to exercise the option? By Sec. 7 (2), 'Any reference to a workman who has been injured

[1] 9 and 10 Vict. c. 93. [2] 43 and 44 Vict. c. 42.

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Sec. 1. (2.) (b) shall, where the workman is dead, include a reference to his legal personal representative or to his dependants, or other person to whom compensation is payable.' That is to say, there are three classes of persons mentioned :

(1) The legal personal representative, *i.e.*, the executor or administrator.

(2) The dependants.

(3) The 'other person,' who by Schedule I. (1) (*a*) (iii) is not included if there are dependants.

It would appear, then, that if there is a personal representative, the option is to be his; and if there is not one, that the dependants are to have the option. Suppose a question arises as to the advisability of commencing an action under Lord Campbell's Act,[1] or claiming compensation under this Act. If there is a personal representative, he alone has a right to bring an action under Lord Campbell's Act [1] within six months of the death (27 and 38 Vict. c. 95, sec. 1). And as six months from the death is the limit of time for claiming compensation under this Act (Sec. 2 (1)), the personal representative will be the only person who has the option of deciding under which Act to proceed.

The question then arises : Can a dependant proceed under this Act, though the personal representative has the option of proceeding either under this Act or under Lord Campbell's Act ?[1] If he cannot, he may lose his right to compensation altogether, as the personal representative may refuse to act at all for six months, when it will be too late to make a claim. If he can, then the personal representative is in reality deprived of his option, because the employer and the dependant might agree as to the amount of compensation to be paid (Sec. 1 (3)), in which case the employer would have become 'liable to pay compensation' under this Act, and consequently by this sub-section would have ceased to be liable to pay damages. And if the employer and dependant do not agree under Sec. 1 (3), and the dependant proceeds to arbitration, how is the personal representative to exercise his option ? Can he commence an action for damages ? If so, there will be two proceedings going on against the employer at the same

[1] 9 and 10 Vict. c. 93.

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time in respect of the same injury. But the employer is only liable to pay in one of them. As soon as one of them is determined, the employer has a good defence to the other. Can either of the proceedings be stayed, and if so, which? **Sec. 1. (2.) (b)**

Again, the personal representative may not be a dependant, but may have a personal claim under Lord Campbell's Act.[1] In such a case it would be to his interest to bring an action for damages in which he and the dependants could share. But the dependants might prefer to claim under this Act, and if they do so, does the fact that the employer has paid compensation—of which the personal representative can have no portion—deprive the personal representative of his rights under Lord Campbell's Act?[1]

These questions are highly technical, and are not likely to arise in common practice. At the same time, it has been thought well to call attention to the difficulties that may arise, through the option being given to the 'workman,' considering what the term workman includes in cases where death results from injury.

Of course, when there is no executor or administrator, the dependants will have the option. An action can be brought in the name of any or all of them immediately after the death, or any dependant can make, or several can join in making, a claim for compensation.

CHOICE OF REMEDIES.—Though the workman has a choice of remedies against his employer, the employer is only liable to pay once; he cannot be made to pay both under this Act and independently of it. Again, though the workman has the option given him of taking proceedings under this Act for the assessment of compensation, or of bringing an action against his employer independently of it, he cannot do both. If he brings an action for damages (*e.g.* under the Employer's Liability Act[2]), and fails, he cannot then, though still in time, commence proceedings for arbitration under this Act. In such a case he can only obtain the benefit of this Act by availing himself of the provisions of Sec. 1 (4); and he must apply then and there to the Judge trying the action for

[1] 9 and 10 Vict. c. 93. [2] 43 and 44 Vict. c. 42.

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Sec. 1. (2.) (b) an assessment of compensation (*Edwards* v. *Godfrey* [1899] 2 Q.B. 333; 80 L.T.R. 672; 15 T.L.R. 365). See note under Sec. 1 (4), at p. 36.

Similarly where circumstances arise which give a workman a claim independently of and also under this Act, and he elects to claim under this Act, but fails to obtain compensation, he will be debarred from afterwards bringing an action for damages, even though his claim to compensation may have failed upon a technicality.

WHEN IS OPTION EXERCISED?—When the workman has once exercised his option, he must abide by his decision. If he elects to proceed under this Act, he cannot afterwards change his mind and bring an action for damages (*Trenear* v. *Wells and Co.*, 109 Law Times 302; *Little* v. *P. and W. Maclellan, Ltd.*, 37 S.L.R. 287; *Hunter* v. *Darngavil Coal Co.*, 38 S.L.R. 6). It is therefore important to inquire what step on the part of the workman will amount to an election to proceed under this Act so as to debar him from bringing an action. It has been held that a mere notice of accident given under Sec. 2 is not a 'proceeding' against the employer, and that a workman who has given such a notice but not proceeded further is not thereby precluded from bringing an action (*Perry* v. *Clements*, 17 T.L.R. 525). But in *Powell* v. *Main Colliery Co.* ([1900] A.C. 366; 83 L.T.R. 85; 16 T.L.R. 466) it was held that the commencement of proceedings was not the request for arbitration but the 'claim for compensation' addressed to the employer. If, therefore, the workman makes a definite demand for compensation from his employer in respect of an accident referred to by its date, it would appear that he has thereby exercised his option and elected to proceed under this Act.

But even where no definite demand for compensation is made, the workman exercises his option if he in fact accepts as compensation from his employer weekly payments under the Act. A receipt signed by a workman 'on account of compensation due to me at this date under the Workmen's Compensation Act' is sufficient evidence that he has exercised his option (*Little* v. *P. and W. Maclellan, Ltd.*, *supra*).

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(*c*) If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed. Sec. 1. (2.) (c)

The injury, provided it was caused by accident arising out of and in the course of an employment to which the Act applies, must be caused by 'the serious and wilful misconduct' of the workman, to relieve the employer from liability. This is very different from the defence of contributory negligence, which is open to the employer under the Employer's Liability Act.[1] Under the old law, a workman could not recover if he had by his own negligence contributed to the cause of the accident. But compensation is given under this Act apart from the consideration of negligence at all. There need be no negligence on the part of the employer, and consequently there can be no defence of contributory negligence open to the employer. Indeed the workman is now entitled to compensation even when his own negligence causes the accident; he only loses his right to it when he is guilty of 'serious and wilful misconduct.'

SERIOUS AND WILFUL MISCONDUCT.—The onus of proving that the injury was attributable to the serious and wilful misconduct of the workman is upon the employer. If the workman proves that he suffered injury by accident arising out of and in the course of any employment to which the Act applies, he is entitled to recover compensation unless the employer proves that the injury was attributable to his 'serious and wilful misconduct.'

It is submitted that, for this defence to succeed, the Arbitrator must be satisfied on the following points:—

(1) That the misconduct of the workman was of a serious nature.

(2) That it was wilful, in the sense that the workman knew, in acting as he did, that he was misconducting himself.

[1] 43 and 44 Vict. c. 42.

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Sec. 1. (2.) (c) (3) That the adoption of such a course of conduct brought about the injury.

What is or what is not 'serious and wilful misconduct' is a question of fact to be determined by the Arbitrator, and his decision will not be reversed on appeal if there was any evidence in support of it. So, where an Arbitrator found that the injury to the applicant was not attributable to his 'serious and wilful misconduct,' the Court of Appeal refused to reverse this decision, as it was a finding of fact and it could not be said that there was no evidence to support it. 'Speaking for myself,' said A. L. Smith L.J., 'I think an appeal against the finding that there has not been "serious and wilful misconduct" on the part of a workman can hardly ever be successful' (*Rumboll* v. *Nunnery Colliery Co.*, 80 L.T.R. 42).

A different ruling, however, has been given by the Court of Session in Scotland. In *Daily* v. *John Watson, Ltd.* (37 S.L.R. 782), a workman committed a breach of a rule forbidding him to wear a lighted naked lamp while carrying cartridges which were not enclosed in a case or canister, with the result that a spark from his lamp ignited the cartridges, which exploded and caused injuries from which he died. The Sheriff-Substitute decided that such a breach of the rule did not amount to 'serious and wilful misconduct,' but his decision was reversed by the Court of Session, who held that the question whether the workman's breach of the special rule was 'serious and wilful misconduct' was a question of law, and that in this case the accident was attributable to the workman's 'serious and wilful misconduct.' A finding that an applicant had not been guilty of 'serious and wilful misconduct' was also upset, on appeal, in the case of *Callaghan* v. *Maxwell* (37 S.L.R. 313). See also *Glasgow and South Western Railway Co.* v. *Laidlaw* (37 S.L.R. 503).

The Court of Appeal have given no definition of 'serious and wilful misconduct,' but they were asked in the case of *Rumboll* v. *Nunnery Colliery Co.* (*supra*) to say that a breach of the rules made under the Coal Mines Regulation Act, 1887,[1] by a workman who was aware of the rules, must in law

[1] 50 and 51 Vict. c. 58.

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amount to 'serious and wilful misconduct.' This they refused to do, holding that every breach of the general or special rules made under the above Act did not necessarily in law amount to serious and wilful misconduct, but that each case must be decided on its own merits. In coming to a decision, the degree of culpability in each case has to be considered, and this at once becomes a question of fact, with the finding of which the Court of Appeal will not interfere, excepting on the ground that there was no evidence to support it. Sec. 1. (2.) (c)

A similar point was considered in a Scotch case, *M'Nichol* v. *Spiers, Gibb and Co.* (106 Law Times 106; 36 S.L.R. 428). In this case the applicant was employed as a miner in the respondents' mine. On the day of the accident the applicant, after drilling a shot-hole and charging it with blasting powder, put a straw in the usual manner into the powder, set fire to the wick at the end of the straw, and retired to a place of safety. The straw having burned out without causing an explosion, the applicant, after an interval of six minutes, thinking that the shot had missed fire, left his shelter and went forward to the shot-hole. While he was examining the hole, the shot went off, and he was severely injured. At the pit-head a printed sheet of Special Rules under the Coal Mines Regulation Act, 1887,[1] was exposed to the view of all the miners, one of such Special Rules providing:—'If a shot has been lighted and does not explode, no person shall enter the place where it was lighted until thirty minutes shall have elapsed.' It was not proved, however, that the applicant was aware of this Special Rule, and it appeared from the evidence that the rule was not generally observed, the miners being in the habit of returning to a delayed or missed shot whenever they thought that it was safe so to return. In these circumstances the Sheriff held that the injuries were not attributable to the 'serious and wilful misconduct' of the applicant. 'I cannot hold,' he said, 'that the careless—it may be reckless—neglect of such a precaution is such "serious and wilful misconduct" on the part of a miner as to disqualify him from being able to recover compensation under this Act of Parliament'; and his decision was upheld on appeal.

On the other hand, disobedience to direct and specific orders

[1] 50 and 51 Vict. c. 58.

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Sec. 1. (2.) (c) has been held to be 'serious and wilful misconduct.' In *Callaghan* v. *Maxwell* (37 S.L.R. 313), a farm servant was employed on the platform of a steam threshing-machine, her duty being to pass the sheaves to the millman. She was specially directed to remain at her place, and was warned of the danger of moving about. Notwithstanding this, she attempted to step across the opening into the mill, through which the machinery was fed with sheaves, as she wished to speak to a girl on the other side. In doing so her foot slipped, and her leg was cut off. The Sheriff-Substitute held that the accident was not attributable to her 'serious and wilful misconduct,' but his decision was reversed on appeal. See also *Guthrie* v. *The Boase Spinning Co. Ltd.* (38 S.L.R. 483).

Again, where a fireman, who had been forbidden to leave the footplate of his engine whilst in motion, nevertheless did so, and thereby met his death, the Judge of the Winchester County Court held that the fact of the man's going on the tender of the engine when it was in motion, knowing at the time that he was breaking the rule, amounted to 'serious and wilful misconduct' (*Jones* v. *London and South-Western Railway Co.*, 111 Law Times 210). See also *Daily* v. *John Watson, Ltd.* (p. 26).

But where there was no finding by the Sheriff-Substitute that the workman's attention had been called to a rule forbidding employees to use a certain hoist, the Court of Session upheld his decision that a workman, who had in fact used the hoist and thereby suffered injury, had not been guilty of 'serious and wilful misconduct' (*Fullerton, Hodgart and Barclay* v. *Logue*, 38 S.L.R. 738).

In *Burrell* v. *Avis* (106 Law Times 61), the Judge of the Greenwich County Court held that a man who went up a ladder when he was drunk was guilty of 'serious and wilful misconduct.'

The words 'serious and wilful misconduct' are new to the Legislature, though the question as to what is 'wilful misconduct' has often been before the Courts (see *Lewis* v. *Great Western Railway Co.*, 3 Q.B.D. 195; *Gordon* v. *Great Western Railway Co.*, 8 Q.B.D. 44). From a consideration of these cases it appears that 'wilful misconduct' means something opposed to accident or negligence, but it would

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serve no useful purpose to attempt to define 'serious and wilful misconduct' as used in this Act, because the Court of Appeal refuse to say what the meaning of the words really is. Consequently the responsibility of deciding whether a workman's conduct is 'serious and wilful' rests with the Arbitrator in each individual case, after he has carefully considered all the surrounding circumstances. Sec. 1. (2.) (c)

THE INJURY MUST BE ATTRIBUTABLE TO THE MISCONDUCT.—Not only must the misconduct be 'serious and wilful' to relieve the employer of responsibility, but it must be shown that the injury was attributable to such misconduct; that is to say, that the misconduct was the primary cause of the injury.

If, for instance, in *Rees* v. *Thomas* ([1899] 1 Q.B. 1015; 80 L.T.R. 578; 15 T.L.R. 301—also p. 11 *ante*), the County Court Judge had found that the deceased had been guilty of 'serious and wilful misconduct,' it is submitted that his widow would still have been entitled to recover, seeing that his death was not caused by his misconduct. He was a miner, and a rule of the mine provided that no workman should ride on full trucks, but he was riding on some trucks which were being drawn by a horse along a tram-line, when the horse bolted. The deceased jumped down, and in running to stop the horse, fell and was killed. But he might have been killed if he had been walking alongside the truck. Even if his conduct in riding on the truck were 'serious and wilful,' it could not be said that such misconduct brought about his death. The bolting of the horse was the primary cause of the accident, and not his misconduct.

(3.) If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the employment is one to which this Act applies), or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the First Schedule to this Act, be Sec. 1. (3.)

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Sec. 1. (3.) settled by arbitration, in accordance with the Second Schedule to this Act.

IF ANY QUESTION ARISES.—It is only when any question arises as to the liability to pay compensation or as to the amount or duration of compensation, that arbitration proceedings can be instituted. An Arbitrator has no jurisdiction unless there is some dispute. When there is no dispute as to the liability to pay or the amount or duration of compensation, the workman is not entitled to an award in arbitration proceedings, his proper remedy being to register a memorandum of the agreement under Schedule II. (8).

This point was raised in *Webster* v. *London and North Western Railway Company* (111 Law Times 209), where the applicant claimed that he was entitled to an award for the weekly payment of 11s. 5d., which had been paid to him under the Act from the second week after the accident, and which at the date of the issue of the arbitration proceedings was also being paid to him. There was no dispute as to the fact that the applicant was receiving the full weekly payments to which he was entitled under the Act, the simple issue being whether he was entitled to an award, the respondents contending that, there being no dispute, the Arbitrator had no jurisdiction to make an award, but that the applicant's remedy, if he thought fit to perfect his title under the Act, was to register a memorandum of the verbal agreement that the respondents alleged subsisted between them and the applicant in the manner prescribed by Schedule II. (8). Upon the above facts the question arose whether the Arbitrator could imply an agreement between the parties. The Judge of the Salford County Court held that he could imply an agreement under which the respondents were to pay 11s. 5d. a week, as such an agreement need not be in writing, and, having implied such an agreement, he held that there was no dispute between the parties, and that therefore the applicant was not entitled to an award, it being necessary, before arbitration proceedings could be instituted, that there should be a dispute to confer jurisdiction, whereas on the facts in this case there was no dispute. See also *Bradbury* v. *The Bedworth Coal and Iron Company* (reported in the *Times* of March 17th, 1900); *Cochrane* v.

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David Traill and Sons (37 S.L.R. 662); *Busby* v. *Richardson* (111 Law Times 231); *Dornan* v. *James Allan Senior and Son* (38 S.L.R. 70). Sec. 1. (2.)

SETTLED BY AGREEMENT.—It is contemplated by the Act that certain questions will be settled by agreement. The Act authorises the parties to come to an agreement between themselves as to:—

(i) The amount of compensation to be paid, subject to the limits prescribed in Schedule I. (Schedule II. (8) and (12)).

(ii) The review of weekly payments (Schedule I. (12)).

(iii) The redemption of weekly payments (Schedule I. (13)).

(iv) The amount of compensation to be paid to partial dependants (Schedule I. (1) (*a*) (ii).

(v) The distribution of compensation among the dependants (Schedule I. (5)).

The agreement need not be in writing, but to be effective, a memorandum of it must be sent to the Registrar of the County Court in which the applicant resides (Schedule II. (8)). A form of this memorandum is given in Appendix B, Form 16, and it must be left at the office of the Registrar, or sent to him 'as soon as may be after the matter has been decided' (Rule 38 (1)). The procedure to be adopted with regard to the memorandum will be found in Rules 38 to 45 of the Workmen's Compensation Rules (p. 276), and when the Registrar is satisfied as to its genuineness, he must record it in a special register, and thereupon the memorandum becomes enforceable as a County Court Judgment (Schedule II. (8)). See note under Schedule II. (8) at p. 225.

But though the agreement need not be in writing, it is advisable that it should be so in all cases, and that the terms of the agreement should be carefully and clearly set out.

If the agreement is one for the payment of weekly sums, it should be stated that such sums are paid as compensation under the Act. If not, it may be contended that they have been given as an act of grace. In the event of such a contention succeeding, in case of the death of the workman, the dependants could obtain the full amount of compensation due to them under Schedule I. (1) (*a*) (i), without regard being had to what had already been paid. But if it is stated in

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Sec. 1. (3.) a written agreement that the weekly sums are paid as compensation under the Act, when subsequent proceedings are brought by the dependants, the amount already paid will be deducted from the sum awarded, because Schedule I. (1) (*a*) (i) provides for the deduction of 'any weekly payments made under the Act.'

PAYMENT OF A LUMP SUM.—There appears to be nothing in the Act to prevent a workman from agreeing to take a lump sum as compensation in full satisfaction of his claim. The Act contemplates, in fact, that the employer and workman may agree, not only as to liability under the Act, but 'as to the amount or duration of compensation,' and if there is such an agreement, there can be no arbitration (see cases cited *supra*).

For instance, in *Dornan* v. *James Allan Senior and Son* (38 S.L.R. 70), a workman signed a receipt for £2, 7s. 4d., being equivalent to four weeks' compensation 'in full satisfaction and discharge of any claim competent to me in consequence of personal injury sustained by me on or about the 29th of August 1899,' such receipt being signed by him on his foreman's representation that the employers' surgeon had reported that he would be well in about a fortnight from that time. The surgeon had in fact so reported, but his report turned out to be erroneous, the workman remaining unfit for his usual work till March 6th, 1900. It was held by the Court of Session (Lord Young dissenting) that the discharge signed by the workman was not liable to be set aside, as it was the outcome of an agreement between the parties to settle a claim regarding which one party knew as much as the other, and that therefore the workman was not entitled to proceed to arbitration.

It will be noticed that this was an agreement for the payment of a lump sum before weekly payments had been continued for six months; and, as the only compensation given to an injured workman during the first six months is a 'weekly payment' (Schedule I. (i) (*b*) and (13)), it is doubtful whether such an agreement is an agreement 'under this Act,' so as to be binding on any one but the workman himself.

For instance, what effect will such a payment of a lump sum have in the event of the workman shortly afterwards succumbing to his injuries? In that case his dependants would be

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entitled to compensation, and no deduction could be made for what had already been paid, as Schedule I. (1) (*a*) (i) only provides for the deduction of 'weekly payments' made under the Act, and not of 'lump sums.' The result would be, that the dependants would be entitled to the full amount of compensation, without having any regard to the lump sum which had already been paid in full satisfaction. See note under Schedule I. (1) (*a*) (i), at p. 171. Sec. 1. (2)

Where the employer enters into an agreement with the injured workman to pay to him a weekly sum as compensation, the workman cannot afterwards proceed to arbitration. The liability to pay compensation and the amount thereof has, in such a case, been settled by agreement, and the employer could plead this sub-section as a bar to any proceedings to have the amount fixed by arbitration. (See *Webster* v. *London and North-Western Railway Company*, on p. 30.) If the employer and workman come to an agreement and a memorandum of that agreement is recorded by the Registrar, it is as binding as an award, and can only be varied on a review under Schedule I. (12).

SHALL BE SETTLED BY ARBITRATION.—Apart from agreement, any question arising is to be submitted to arbitration in accordance with Schedule II. The following questions, among others, may so arise, and consequently may be the subject of arbitration :—

(*a*) The question whether or not the employment is one to which the Act applies (Sec. 1 (3) and Sec. 7).

(*b*) The question whether the applicant is a workman within the meaning of the Act (Sec. 7 (2)).

(*c*) The question whether the workman was injured by accident arising out of and in the course of his employment (Sec. 1 (1)).

(*d*) The question whether the injury was attributable to the serious and wilful misconduct of the workman (Sec. 1 (2) (*c*)).

(*e*) The amount and duration of compensation (Sec. 1 (3)).

(*f*) The question as to who are dependants, and whether they were wholly or partially dependent upon the earnings of the deceased (Schedule I. (1) (*a*)).

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Sec. 1 (3.)

(*g*) The question whether the employer has already paid compensation independently of the Act (Sec. 1 (2) (*b*)).

(*h*) The question whether the workman has already recovered damages from a third party in respect of the injury (Sec. 6).

(*i*) The revision of awards (Schedule I. (12)).

(*j*) The redemption of weekly payments by the payment of a lump sum (Schedule I. (13)).

(*k*) The question as to whether a contractor is liable to indemnify an undertaker, where both are made respondents (Sec. 4 and Rule 23 (2)).

(*l*) By consent, the question as to the liability of any third party to indemnify the undertaker (Rule 22).

(*m*) The question as to whether the procedure required by the Act has been adopted.

(*n*) The question as to what were 'the average weekly earnings' of the workman.

(*o*) Generally, as to the liability to pay compensation.

Sec. 1. (4.)

(4.) If, within the time hereinafter in this Act limited for taking proceedings, an action is brought to recover damages independently of this Act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the Court in which the action is tried shall, if the plaintiff shall so choose, proceed to assess such compensation, and shall be at liberty to deduct from such compensation all the costs which, in its judgment, have been caused by the plaintiff

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bringing the action instead of proceeding under this Act. Sec. 1 (4.)

In any proceeding under this sub-section, when the Court assesses the compensation it shall give a certificate of the compensation it has awarded and the directions it has given as to the deduction for costs, and such certificate shall have the force and effect of an award under this Act.

TIME LIMITED FOR TAKING PROCEEDINGS.—The limit of time is six months from the occurrence of the accident causing the injury, or, in case of death, six months from the time of death. See Sec. 2 (1), and note thereon at p. 41.

THE COURT IN WHICH THE ACTION IS TRIED.—The 'Court' here must mean the Judge alone. It cannot mean the Judge and Jury. If a jury has given its verdict in the action, it has done all that it was called upon to do. It cannot afterwards be asked to decide whether the defendant is liable as an employer under this Act, because that would be substituting the ordinary proceedings of an action, instead of adopting the arbitration procedure provided by this Act. The wording of the section is confusing. It provides for the question of the liability of the employer to pay compensation under this Act to be 'determined in the action.' There might be great difficulty in determining such liability, as the issues might be totally different from those of the action. Sufficient evidence might not have been given to enable the Judge to decide whether the plaintiff is entitled to compensation under the Act or not. Consequently it is submitted that, after the verdict is given against the plaintiff, the Judge is to consider the question of the defendant's liability under this Act before giving judgment. He in fact becomes an Arbitrator under the Act, and, if there is not sufficient evidence before him, he can postpone giving judgment and adjourn the case, to enable the plaintiff to bring evidence to establish his right to compensation. This appears to be the only procedure that can be adopted in such cases.

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Sec 1. (4.) **IF THE PLAINTIFF SHALL SO CHOOSE.**—The plaintiff must so choose, or go without compensation altogether. That is the effect of the decision in *Edwards* v. *Godfrey* ([1899] 2 Q.B. 333; 80 L.T.R. 672; 15 T.L.R. 365), where it was held that a workman, who exercises his option by bringing an action independently of the Act and fails in such action, can only obtain the benefit of the Act by availing himself of the provisions of this sub-section; and he must then and there apply to the Judge trying the action, for an assessment of compensation, or go without it. A. L. Smith L.J. expressed his opinion that Sec. 1 (2) (*b*) gives to the workman the option of claiming independently of or under the Act, and that when he has exercised the option there is an end of the matter, excepting in one case. The exception referred to is the case mentioned in this sub-section, which gives the workman a *locus pœnitentiæ*, where, having exercised his option, and having found out too late that he has exercised it in the wrong way, he can still ask the Judge before whom the action was tried, to assess the compensation. 'That is a clear benefit to the workman,' he said, 'and while giving it to him, the sub-section also confers a benefit upon the employer, by giving the County Court Judge power to deduct from the compensation which he awards, all the costs caused by bringing the action instead of taking proceedings under the Act; that is a fair enactment, giving something to the master and man alike. I believe the construction which I have placed upon Sub-section 4 to be the true one; were it not so, the workman would never make his application for an assessment of compensation while the County Court Judge had seisin of the action; he would wait until the action was at an end, and would then bring a fresh claim under the Workmen's Compensation Act, and would so get compensation, without having the costs caused by his bringing the action set off against the amount of his compensation.' In view of this decision, the words 'if the plaintiff shall so choose' appear to be ironical, for if he does not so choose, he loses his compensation altogether. See also *Baird* v. *S. Higginbotham and Co., Ltd.* (38 S.L.R. 479).

ALL THE COSTS.—What is meant by 'all the costs'? The plaintiff in the action incurs costs as well as the defendant,

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but it would be manifestly unfair to deduct from the amount awarded the costs incurred by the plaintiff, since, as the action is dismissed, the defendant has not to pay the plaintiff's costs. If both the plaintiff's and defendant's costs were deducted from the amount awarded, the plaintiff would in reality be paying the costs twice over. 'All the costs' probably means the costs incurred by the defendant through the plaintiff bringing an action, which would not have been incurred if the plaintiff had proceeded to arbitration under the Act. Sec. 1. (4.)

In *Skeggs* v. *Keen* (reported in the *Times* of June 19th 1899) a workman brought an action against his employers under the Employer's Liability Act,[1] at the hearing of which judgment was given for the defendants with costs. At the request of the workman, the Judge thereupon proceeded to assess compensation under this sub-section. The defendants' costs of the action were taxed, but the workman claimed that he was entitled to have all the costs, which he would have had to incur if he had proceeded under the Workmen's Compensation Act, set off against the costs of the action. The County Court Judge found (1) that the employers were always willing to admit their liability under the Workmen's Compensation Act, and that if the workman had proceeded under that Act, there would have been no costs incurred, as there would have been no litigation; and (2) that there was no jurisdiction to give a workman any costs in respect of the assessment of compensation, when his claim to such compensation was only made after his failure in an action. He accordingly directed that the workman was to have no costs. The workman appealed.

The Court of Appeal dismissed the appeal on the ground that, according to the first finding of the County Court Judge, all the costs were incurred in the action, and not a penny of the costs was attributable to the assessment of compensation under the Workmen's Compensation Act. The Court did not decide the point of law raised by the second finding of the County Court Judge, as his findings of fact rendered this unnecessary; but Rigby L.J. was of opinion that, when the

[1] 43 and 44 Vict. c. 42.

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Sec. 1. (4.) claim for compensation was only made on the failure of an action, there was no jurisdiction to give the workman any costs over and above the compensation awarded.

The point of law is an important one, and may often arise when a workman fails in an action against his employer. By this sub-section the County Court Judge is empowered, when, after the failure of an action, application is made to him to assess compensation, to deduct from the compensation awarded 'all the costs which have been caused by the plaintiff bringing the action instead of proceeding under this Act.' This appears to imply that, though the plaintiff has failed in his action, he is nevertheless entitled to such costs as he would have incurred if, instead of bringing an action, he had, in the first instance, proceeded under this Act. It would appear, then, that there is jurisdiction, not perhaps allow the plaintiff any actual costs to himself, but to give him a rebate from the costs of the action, which he has to pay, equal to the amount of costs which the Judge, as Arbitrator, thinks he would have incurred, if he had proceeded under the Workmen's Compensation Act. Further than this, if when the Judge becomes an Arbitrator under this Act, the defendant continues, when he becomes respondent, to contest the claim, and to raise defences under the Workmen's Compensation Act, which, for instance, may necessitate an adjournment, then it would seem reasonable that the Judge might allow the plaintiff, now being an applicant, costs incurred by the respondent's conduct.

Though this sub-section does not say that the Court 'shall' deduct the costs, the Court will probably do so in most cases.

CERTIFICATE OF COMPENSATION.—When the Court assesses the compensation, it must give a certificate of the compensation awarded, and such certificate has the force of an award under this Act. A form of the certificate is given in Appendix B, Form 22, see p. 309.

Sec. 1. (5.) (5.) Nothing in this Act shall affect any proceeding for a fine under the enactments relating to mines or factories, or the application of any such

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fine, but if any such fine, or any part thereof, has been applied for the benefit of the person injured, the amount so applied shall be taken into account in estimating the compensation under this Act. Sec. 1. (5.)

The effect of this sub-section is, that where a workman has received a penalty or part of a penalty imposed upon his employer for a breach of any of the provisions of the Factory Acts or Acts relating to mines, he shall not be deprived of his right to recover compensation under this Act. But, as he has already received something from his employer in respect of his injury, the sum so received is to be taken into consideration in estimating the amount of compensation to be awarded.

If any fine has been applied for the benefit of the injured workman or his dependants, particulars of it must be inserted in the Application for Arbitration. See Forms 1 and 2 in Appendix B.

The provisions relating to fines which may be so applied will be found in—

Factory Act 1878 (41 and 42 Vict. c. 16), Sec. 82.

Factory and Workshop Act 1895 (58 and 59 Vict. c. 37), Sec. 13.

Coal Mines Regulation Act 1887 (50 and 51 Vict. c. 58), Sec. 70.

Metalliferous Mines Regulation Act 1872 (35 and 36 Vict. c. 37), Sec. 38.

Sec. 2. (1.) Time for taking proceedings

2.—(1.) Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made

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Sec. 2. (1.) within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death. Provided always that the want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings, if it is found in the proceedings for settling the claim that the employer is not prejudiced in his defence by the want, defect, or inaccuracy, or that such want, defect, or inaccuracy was occasioned by mistake or other reasonable cause.

PROCEEDINGS.—Who is to institute proceedings? The injured workman of course may do so; but if the workman be dead, considerable difficulty arises, and the question is dealt with under Sec. 7 (2), at p. 153.

NOTICE OF ACCIDENT.—It is one of the conditions of the right to obtain compensation, that notice of the accident has to be given as soon as practicable after the happening of it, though the giving of notice will be excused, if it is found that the employer is not prejudiced in his defence thereby, or if the want of such notice was occasioned by mistake or other reasonable cause. The words used in this Act with reference to the contents of the notice are the same as those used in the Employer's Liability Act,[1] and no doubt the Courts will deal with the question in the same way. If so, the notice must be in writing, as it was held in *Moyle* v. *Jenkins* (8 Q.B.D. 116) that verbal notice, even where the employer was aware of the circumstances of the accident, was not sufficient. A Form of Notice of Accident will be found in Appendix E, p. 325.

AS SOON AS PRACTICABLE.—It will in all cases be a question of fact for the Arbitrator to determine, whether the notice was given as soon as practicable after the happening of the accident. Under the Employer's Liability Act[1] a definite period is fixed,

[1] 43 and 44 Vict. c. 42.

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as the notice has to be given within six weeks, and there is no proviso (excepting in the case of death), as there is in this Act, excusing the notice. Sec. 2. (1.)

Mere delay in sending the notice does not necessarily prejudice the employer. In order to bar the claim of a workman who has failed to give notice of the accident in the terms of this sub-section, it must be shown that the employer has in fact been prejudiced by want of such notice (*M'Lean* v. *Carse and Holmes*, 36 S.L.R. 678).

But the onus of proving that the employer has not been prejudiced lies, in the first instance, upon the workman, though very slight evidence would be sufficient to shift the onus upon the employer. So where a workman had not given notice of the accident till seventeen days after it had occurred, and the Sheriff found that 'it was not proved' (*a*) that the delay in giving notice was occasioned by mistake or other reasonable cause, or (*b*) that the respondents had not been prejudiced in their defence by reason of the delay in giving notice, it was held that, as the onus of proving that the employer had not been prejudiced lay, in the first instance, upon the workman, and as it did not appear from the Sheriff's findings that this onus had been discharged, the workman's claim to compensation was accordingly barred (*Shearer* v. *Miller and Sons*, 37 S.L.R. 80). 'The applicant,' said Lord Adam, 'by failing to give the proper notice, bars himself from maintaining proceedings under the Act, and he can only surmount the bar by proving either that the respondents are not prejudiced in their defence, or that the want of such notice was occasioned by mistake or other reasonable cause.'

BEFORE THE WORKMAN HAS VOLUNTARILY LEFT THE EMPLOYMENT.—Though the notice must be given before the workman has voluntarily left the employment in which he was injured, the claim under the Act need not be made within that period.

CLAIM FOR COMPENSATION; TIME FOR TAKING PROCEEDINGS.—By this sub-section 'proceedings' for the recovery of compensation shall not be maintainable, unless the 'claim for compensation' has been made within six months from the occurrence of the accident. What amounts to the claim for

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Sec. 2. (1.) compensation, and when are proceedings for recovery under the Act taken? Will a notice given by the workman to his employer, stating that he claims to be entitled to compensation under the Act, constitute the 'claim for compensation,' or must it be the initiation of proceedings which will give to some tribunal the power of deciding under the Act whether the employer is liable to pay compensation or not? In other words, is it sufficient that the workman has, within six months from the occurrence of the accident, sent a notice claiming compensation from the employer, or must some judicial step be taken to recover it before the expiration of that time?

POWELL v. MAIN COLLIERY COMPANY. — This question came before the Courts in the case of *Powell* v. *Main Colliery Company, Ltd.* ([1900] 2 Q.B. 145; 82 L.T.R. 340; 16 T.L.R. 282; House of Lords [1900] A.C. 366; 83 L.T.R. 85; 16 T.L.R. 466). The facts in the case were these: A workman met with an accident causing personal injury on the 21st December 1898. On the 2nd May 1899 he served on his employers a written notice of the accident, and also a notice as follows:—

'NOTICE OF CLAIM.

'To the Main Colliery Company (Limited), Skewen.

'Take notice that I claim the sum of 15s. per week from the 4th January 1899, until such date as I shall be able to resume work, as compensation for injuries received by me on the 21st December 1898, at your colliery at Bryncoch.

'(Signed) WILLIAM POWELL.

'Address—Mount Pleasant, Clydach, R.S.O.'

On the 4th October 1899 he filed a request for arbitration in the County Court in Form I. of the Forms under the Act. (See Appendix B, p. 287.) The employers, in their answer, pleaded that no compensation could be awarded as the proceedings were out of time, the claim for compensation not having been made within six months from the occurrence of the accident. It was contended on behalf of the respondents, that the 'claim for compensation' must be interpreted to mean the initial step in the proceedings before the tribunal

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by which compensation is to be assessed; that the commencement of the proceedings must be the first step which gives the tribunal (whatever it may be) seisin of the dispute between the employer and workman; and that in this case, the only claim made within the meaning of the sub-section was the request for arbitration filed by the workman nine months and eleven days after the accident. On behalf of the applicant it was contended, that the 'claim for compensation' meant any definite demand, specifying what compensation was claimed and in respect of what accident, made by an injured workman upon his employer; and that, in this case, the requirements of this sub-section were satisfied by the above 'notice of claim' of the 2nd May 1899. The County Court Judge overruled the respondents' objection, and made an award of compensation in favour of the applicant. **Sec. 2. (1.)**

POWELL v. MAIN COLLIERY COMPANY BEFORE THE COURT OF APPEAL.—On appeal, the Court of Appeal (Romer L.J. dissenting) adopted the respondents' interpretation of this sub-section, and held that the 'claim for compensation' meant the initiation of proceedings before the tribunal by which compensation was to be assessed, and not a mere notice of claim sent to the employers; that, in this case, the request for arbitration should therefore have been made within six months from the occurrence of the accident; and that the proceedings were consequently out of time. This decision was arrived at on the ground that, from a comparison of the words in Sec. 1 (4) and those in this sub-section, it was clear that it was the intention of the Legislature to impose a limit of six months on the putting of rights in suit under this Act; and it was also pointed out by the majority of the Court, that if such a claim as was made in this case could be held to be '*the* claim for compensation,' then a workman, having made such a claim within six months, might let the matter rest for any length of time, during which the employer would be under the risk of having proceedings brought against him, but without the means of ascertaining finally whether they were going to be brought or not.

This decision was unsatisfactory. The effect of it was that, to enable a workman to obtain compensation, he had, within six months from the accident, to take some step before the

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Sec. 2. (1.) tribunal by which he wished compensation to be awarded, to enforce his claim. What that step had to be, differed according to whether the tribunal was the County Court Judge, or a committee, or an agreed Arbitrator. If the tribunal were the County Court Judge, he would have to file his request for arbitration within six months from the accident; if it were a committee or agreed Arbitrator, he would have to lay his claim before them within that period, and ask them to adjudicate upon it. When he had taken either of these steps, and not before, he would have made a 'claim for compensation' before the tribunal which had to decide the matter. If such was the correct interpretation of the words, a workman might often, through ignorance, be deprived of the compensation to which he was really entitled. He might send in a written claim, and if his employer afterwards paid him half his weekly wages week by week, he would be entitled to think that his employer admitted liability, and that therefore it was unnecessary for him to proceed to arbitration. But after his employer had continued these weekly payments for six months, he could discontinue them at once, and the workman could not take proceedings to compel him to renew them, as he had not filed a request for arbitration within the time limited for claiming compensation. Such a result would have been manifestly unfair to a workman, and it is not surprising that there was an appeal from the decision of the Court of Appeal.

POWELL v. MAIN COLLIERY COMPANY IN THE HOUSE OF LORDS.—The case was taken on appeal to the House of Lords, who reversed the decision of the Court of Appeal and restored the award made by the County Court Judge. It was not necessary, said the House of Lords, that the 'claim for compensation' required by this sub-section to be made within six months of the occurrence of the accident, should be made in some form of legal procedure, and the form of the claim sent by the workman to his employers in this case satisfied the requirements of the sub-section. 'Reading the actual claim which was made in this case,' said the Lord Chancellor, 'no one could reasonably doubt that, unless there were some circumstance extrinsic to the actual words, this was a "claim or compensation." It was made by the person injured,

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served by him upon the employers, and the claim was stated and described as made for a definite sum, in respect of an accident referred to by its date. Without giving an artificial meaning to the words, no one could doubt that this was a "claim for compensation" under the Act, as it purported to be.' The appeal was allowed by a majority of five to one, Lord Morris dissenting, and the majority were of opinion that the difficulty of a claim hanging over the employer's head for an indefinite time, without his having any power to have it decided, did not arise, as if, after a claim had been made in valid form, the workman delayed to initiate arbitration proceedings, the employer would be entitled to do so. 'As soon as the claim was sent to the employer,' said Lord Robertson, 'he could, if he disputed it, himself take the difference to arbitration and have it settled.'

Sec. 2. (1.)

If the decision of the Court of Appeal had been followed, the words 'request for arbitration' would have been substituted for the words 'claim for compensation,' where the tribunal selected was the County Court Judge. The words of the sub-section, as pointed out by Romer L.J. in the Court below, are 'unless the claim for compensation has been made within six months.' The sub-section does not say 'unless proceedings for arbitration have been taken within six months,' and to so interpret them appears to enlarge the Act of Parliament unnecessarily. The majority of the Court of Appeal placed reliance on the decision of the Court of Session in Scotland in *Bennett* v. *Wordie and Co.* (36 S.L.R. 643), but the Lord Chancellor made it clear that in that case there was really no claim made at all; there was merely an intimation that the employers would be held liable, and a general demand for compensation, instead of a claim for a specific sum.

It must be observed that the decision in this case does not excuse the necessity of the claim for compensation being made within six months; all it decides is, that the particular form of claim made in the case was 'the claim for compensation' within the meaning of this sub-section. A Form of the Claim for Compensation will be found in Appendix E, p. 326, and injured workmen are advised to make their claims in some such form as is there set out, and to take care that such

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Sec. 2. (1.) claims are made upon their employers before the expiration of six months from the occurrence of the accident. But though the 'claim for compensation' need not take the form of a 'request for arbitration,' it has been held in Scotland that a request for arbitration under the Act is a sufficient 'claim' to satisfy the requirements of this sub-section. (*Great North of Scotland Railway Co.* v. *Fraser*, 38 S.L.R. 653.)

APPLICATION FOR ARBITRATION BY EMPLOYER.—Owing to the opinion expressed by the majority in the House of Lords in *Powell* v. *Main Colliery Co.* (*supra*) that if, after a claim had been made in valid form, the workman delayed to initiate arbitration proceedings, the employer could do so, the Workmen's Compensation Rules, 1900, have been issued under which this can be done. Where the employer desires to make an application for the settlement of any matter by arbitration, he can file a request for arbitration in accordance with Rule 8, to which the workman, or the legal personal representative and the persons claiming to be dependants of the deceased, or the 'other persons' (as the case may be) on whose behalf the claim was made, will be respondents. See Workmen's Compensation Rules, 1900, in Appendix I. at p. 332.

WHEN EMPLOYER HAS ADMITTED LIABILITY AND CONTINUED PAYMENTS FOR OVER SIX MONTHS.—The provision in this sub-section, which requires the claim for compensation to be made within six months from the occurrence of the accident, is not necessarily an absolute bar to proceedings for the assessment of compensation commenced after the six months have expired, as the Arbitrator has jurisdiction to inquire, whether there are any circumstances in the case to debar the employer from raising that defence. For instance, an agreement arrived at between the parties shortly after the accident, that there is a statutory liability on the employer to pay compensation, the amount of it being left over for future settlement, is evidence upon which an Arbitrator may properly find that the employer is estopped from setting up the defence that the claim is out of time. Such were the circumstances in *Wright* v. *John Bagnall and Sons, Ltd.* ([1900] 2 Q.B. 240; 82 L.T.R. 346; 16 T.L.R. 327). A workman, who was earning 21s. a week, met with an accident causing an injury on the 23rd November 1898. On the 6th

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December the respondents admitted their liability, and began to pay the applicant 10s. 6d. a week, this weekly payment being continued until September 1899. About Easter 1899, some discussion took place between the applicant and the respondents' manager, as to commuting the weekly payments for a lump sum, but no conclusion was arrived at. The negotiations were again taken up, the manager offering £20, while the applicant claimed £200; and the manager said, that if the applicant talked about such a sum, the respondents would go to Court about it. The payments having ceased in September 1899, the applicant filed a request for arbitration in October 1899; but the County Court Judge found that the proceedings were out of time, and therefore made an award in favour of the respondents.

Sec. 2. (1.)

The Court of Appeal sent the case back to him, on the ground that, as there was an agreement that the workman was entitled to compensation, the amount of it being the only point that remained unsettled, the respondents were debarred from raising the objection of lapse of time. Collins L.J. also stated that they had debarred themselves from raising the point, by having treated the matter as open to negotiation during the whole of the time in which they had been paying the applicant.

But the mere fact that the employer has made weekly payments to a workman who has been injured by accident, is not conclusive evidence of an admission of liability and an agreement to pay compensation, so as to bring the case within *Wright* v. *John Bagnall and Sons* (*supra*). For instance, in *Rendall* v. *Hill's Dry Docks and Engineering Co., Ltd.* ([1900] 2 Q.B. 245; 82 L.T.R. 521; 16 T.L.R. 368), it was held that, there being no evidence of any admission on the part of the employers of their liability under the Act to pay compensation, they were not estopped from taking the objection that the claim for compensation was out of time. In this case the applicant was injured by an accident in December 1898. The respondents were insured against claims under the Act, and their manager sent particulars of the accident to the insurance company, returning the wages of the applicant at £2 a week. A month after the accident, an agent of the insurance company called upon the applicant and handed him £1, taking a receipt

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Sec. 2. (1.) from him in the following form :—'Received of the Hill's Dry Docks and Engineering Co., Ltd., per the British Employer's Mutual Indemnity Association, Limited, the sum of £1 on account of compensation which may be or become due to me, under the Workmen's Compensation Act, 1897, in respect of the accident which occurred to me on the 19th day of December 1898.' A similar payment was made and a similar receipt taken weekly for ten months, when the payments ceased. The applicant then filed his request for arbitration, and relied on *Wright* v. *Bagnall and Sons, Ltd.* (*supra*). But the Court of Appeal distinguished this case on the ground that here there was no evidence of any admission on the part of the respondents of their liability to pay compensation to the applicant, and held that there was no evidence of waiver on the part of the respondents, or of anything that could estop them from taking the objection, that the request for arbitration was out of time.

From a consideration of the two foregoing cases, it will be seen that the payment of weekly sums by the employer to the workman, will not of itself be sufficient to prevent the employer from raising the defence of lapse of time. To estop him from doing so, there must be evidence of his admission of liability under the Act, that is to say, evidence of an agreement between the employer and workman, that the employer is under a statutory obligation to pay compensation. Consequently a workman will be well advised not to be content with such weekly payments, unless he can obtain a written agreement from his employer, a memorandum of which should be sent to the Registrar of the County Court under Schedule II. (8). Failing such an agreement, the workman should in all cases, whether he is receiving weekly payments or not, make a claim for compensation and file a request for arbitration within six months from the occurrence of the accident.

Both these cases were decided before *Powell* v. *Main Colliery Co.* (p. 42) reached the House of Lords, and consequently the point, as to whether a 'claim for compensation' had been made within the prescribed time, was not argued, it having been decided by the Court of Appeal in that case that a 'claim for compensation,' where the tribunal

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selected to assess the compensation is the County Court Judge, means the filing of a request for arbitration. It is now settled law, that the claim for compensation need not be made in any special form, so long as it claims a specific sum as compensation in respect of injury received by a particular accident. But it must still be made within six months from the occurrence of the accident, and having been made within that time, the request for arbitration may be filed at any future time, though in practice it will be found advisable, both to make the claim for compensation and proceed to arbitration within that period. Sec. 2 (1.)

DEFECT OR INACCURACY IN NOTICE: EFFECT OF.—Owing to the wide meaning of the words in the proviso, it is clearly the intention of the Legislature that no claim for compensation ought to be defeated on mere technical grounds. Not only is any defect or inaccuracy in the notice excused, but even the want of any notice at all is not to be a bar to proceedings, if the employer is not prejudiced in his defence thereby, or if it was occasioned by mistake or other reasonable cause. As it will be a question of fact in each case for the Arbitrator to decide, whether the employer is so prejudiced, or whether the want of a notice, or any defect or inaccuracy therein, was caused by mistake or other reasonable cause, it is probable that rarely, if ever, will the finding of these facts be against the workman so as to prevent him from recovering compensation. (But see the Scotch case of *Shearer* v. *Miller and Sons*, *ante*, p.41.) But even though the notice may, under certain circumstances, be excused, it is the obvious duty of a workman who intends to make a claim, to send a formal notice of the injury at the earliest possible moment.

It must be observed that the words in the proviso refer only to the notice of accident mentioned above, and not to the claim for compensation. It is imperative that the claim for compensation should be made within six months from the occurrence of the accident; otherwise proceedings for recovery under the Act will not be maintainable (see *Powell* v. *Main Colliery Co., Ltd.*, and notes thereon at p. 42).

It may also be pointed out that there are no words in the proviso excusing the direction that the notice must be given before the workman has voluntarily left his employment.

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Sec. 2. (1.) Consequently this should always be done; though as the notice itself may, under certain circumstances, be dispensed with, it follows that the necessity of giving it before voluntary retirement from the work, may, under similar circumstances, be excused.

The words of this proviso differ from those of the Employer's Liability Act,[1] Sec. 7 of which provides that:—'A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the Judge, who tries the action arising from the injury mentioned in the notice, shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading.' Hence to enable an action to succeed under that Act, there must always be a notice. In no case, except when death results, can it be excused, whereas under this Act, as has been already seen, it can be excused under other circumstances. Again, under the Employer's Liability Act,[1] to be invalid, the notice has to be both defective and fraudulent, whereas under this Act, the defect must either prejudice the employer, or must not have been occasioned by mistake or other reasonable cause. In this Act there is no mention of 'defect or inaccuracy for the purpose of misleading'; but if it was occasioned neither by mistake nor other reasonable cause, it would appear that it must have been for the purpose of misleading.

Sec. 2. (2.) (2.) Notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or, if there is more than one employer, upon one of such employers.

Sec. 2. (3.) (3.) The notice may be served by delivering the

[1] 43 and 44 Vict. c. 42.

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same to or at the residence or place of business of the person on whom it is to be served. Sec. 2. (3.)

(4.) The notice may also be served by post by a registered letter addressed to the person on whom it is to be served at his last known place of residence or place of business, and if served by post shall be deemed to have been served at the time when the letter containing the same would have been delivered in the ordinary course of post, and in proving the service of such notice it shall be sufficient to prove that the notice was properly addressed and registered. Sec. 2. (4.)

(5.) Where the employer is a body of persons corporate or unincorporate, the notice may also be served by delivering the same at, or by sending it by post in a registered letter addressed to the employer at the office, or, if there be more than one office, any one of the offices of such body. Sec. 2. (5.)

The words in these four sub-sections are the same as those contained in Sec. 7 of the Employer's Liability Act.[1]

WHAT THE NOTICE MUST CONTAIN.—The notice must contain—

(i) The name and address of the injured person.

(ii) The cause of the injury.

(iii) The date at which the injury was sustained.

The notice is only intended to give in 'ordinary language' the cause of the injury. It is not necessary that it should be carefully and accurately drawn up in legal form, but it must contain all the above-named particulars. If it does not, it may be held to be an invalid notice, if the omission of any particular prejudices the employer in his defence, or if it

[1] 43 and 44 Vict. c. 42

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Sec. 2. (5.) was not occasioned by mistake or other reasonable cause (Sec. 2 (1)). A form of notice, which it will be well to follow, will be found in Appendix E at p. 325.

HOW THE NOTICE IS TO BE SERVED.—The notice is to be served on the employer, or, if there is more than one employer, on one of such employers. It may be served on the employer in any of the following ways:—

(i) By delivering it to or at the residence of the employer, or one of the employers.

(ii) By delivering it to or at the place of business of the employer, or one of the employers.

(iii) By post by registered letter addressed to the employer, or to one of the employers, at his last known place of residence.

(iv) By post by registered letter addressed to the employer, or to one of the employers, at his last known place of business.

(v) Where the employer is a body of persons or company, by delivering it at the office, or at any one of the several offices, of the employer, or by sending it by post in a registered letter addressed to such office.

It must be remembered that the onus of proving that the respondent has received the notice of injury is upon the applicant. Consequently where it is delivered at the residence or place of business of the employer, it ought to be delivered in such a way that it will come to the knowledge of the employer in the ordinary course of business. Where it is served by post, it ought to be registered, as in proving the service of it, it is sufficient to prove that the notice was properly addressed and registered, and it is therefore advisable that this mode of service should be adopted in all cases.

Sec. 3. (1.) Contracting-out.

3.—(1.) If the Registrar of Friendly Societies, after taking steps to ascertain the views of the employer and workmen, certifies that any scheme of compensation, benefit, or insurance for the workmen of an employer in any employment,

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whether or not such scheme includes other employers and their workmen, is on the whole not less favourable to the general body of workmen and their dependants than the provisions of this Act, the employer may, until the certificate is revoked, contract with any of those workmen that the provisions of the scheme shall be substituted for the provisions of this Act, and thereupon the employer shall be liable only in accordance with the scheme, but, save as aforesaid, this Act shall apply notwithstanding any contract to the contrary made after the commencement of this Act. Sec. 3. (1.)

(2.) The Registrar may give a certificate to expire at the end of a limited period not less than five years. Sec. 3. (2.)

This section makes contracting-out of no effect, unless it is on a scheme duly certified by the Registrar of Friendly Societies. From the Report of the Chief Registrar of Friendly Societies for the first six months of the working of the Act, it appears that, in order to ascertain the views of the employer and workmen, the employer and such of the workmen as joined in the application were required to state their views in writing in a document accompanying the scheme.

Upon receipt of an application so supported, a letter was addressed to the employer, for the purpose of ascertaining the views of the workmen who did not join in the application. The employer was asked to suspend a copy of the scheme in each workshop, with a notification that any workman would be at liberty, within twenty-eight days of the date of suspension, to send to the Registrar's office his observations on the scheme. These steps were necessary, as it is a condition precedent to the granting of a certificate by the Registrar, that

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Sec. 3. (2.) he should 'take steps to ascertain the views of the employer and workmen.'

The investigation that followed these preliminary steps, was directed to two points :—

1. Would the employer pay as much under the scheme as he would have to pay under the Act?
2. Would the workman derive as much benefit under the scheme as he would under the Act?

On these questions will depend the fact whether the scheme, as required by the Act, is 'on the whole not less favourable to the general body of workmen and their dependants than the provisions of this Act.'

In his Report for the year ending 1899, the Chief Registrar of Friendly Societies makes the following observations on the schemes that were certified by him :—

1. That several of them were adopted by the virtually unanimous assent of employers and workmen.
2. That even so, the Registrar, in one case at least, declined to grant a certificate until better terms than the workmen had stipulated for had been conceded.
3. That in several cases ballots of the workmen were taken in favour of or against the scheme.
4. That these ballots were always inconclusive.
5. That the answer 'yes' or 'no' to a question by ballot, 'Do you approve of the scheme?' is of no assistance to the Registrar.
6. That the Registrar has to find, as a fact, that the scheme is not less favourable to the workmen than the provisions of the Act, and for that purpose has to ascertain the views of the employer and workmen.
7. That these views must be so expressed, in criticism of the scheme, as to supply the Registrar with the local information that ought to affect the decision on the scheme, or to suggest points in which it could be improved.
8. That the Registrar has not failed to take advantage of the assistance of the trade unions in ascertaining the views of the workmen, even where the employers

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have denied that the trade unions correctly repre- Sec. 3. (2.
sented those views.

9. That many of the objections raised by the trade unions have been directed to an alleged compulsion by the employer to join the scheme, whereas such compulsion is expressly excluded by the Act.

10. That where the views of a portion of the workmen have been conveyed through a trade union, and answered by the applicants, the trade union has been given the right to reply, and has had the last word.

CERTIFIED SCHEME: EFFECT OF.—A scheme, when certified, has no binding effect of itself; it only enables the employer to contract with any of his workmen that the scheme shall be substituted for the Act. If the workman enters into such a contract, he binds his dependants as well as himself; for, after the scheme has been certified and the contract made, the employer is liable 'only in accordance with the scheme.'

But if a workman accepts the provisions of a certified scheme instead of those of the Act, he does not thereby lose his right to claim damages under the Employer's Liability Act[1] or at common law. The scheme is substituted for this Act and this Act alone. It cannot deprive the workman of his rights under the Employer's Liability Act[1] or at common law, unless the workman enters into a contract with his employer that it shall be accepted as a substitution for all his rights, whether under this Act or independently of it.

NOT LESS FAVOURABLE TO THE GENERAL BODY OF WORKMEN.—From the Report of the Chief Registrar of Friendly Societies for the year ending 1899, it appears that the schemes already certified are much more favourable to the workmen than the provisions of the Act. The following extract is taken from the Report:—

'In the aggregate the thirty-two schemes certified in 1898 and in operation on 30th June 1899, had at that date been adopted by 100,397 workmen, who had contributed £30,220. The employers had contributed £40,676. The payments on death had been £7,867; during incapacity £31,197; and for

[1] 43 and 44 Vict. c. 42.

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Sec. 3. (2.) other benefits £5,327. The funds had increased during the year by £24,436. The number of deaths resulting from injury was 102, and in 74 of these dependants were left, to nearly all of whom pensions were awarded in addition to the sums payable on death. The number of cases of incapacity from injury was 14,165. The average duration of incapacity was three weeks two days, and the average weekly allowance 13s. Taking into account

(*a*) the other benefits;

(*b*) the payments during the first two weeks of incapacity;

(*c*) the subsequent payments in excess of those provided by the Act; and

(*d*) the increase of funds,

it would appear that in the aggregate the workmen derive from those schemes benefits considerably exceeding the amounts of their contributions. The circumstance that the common interest of employer and workmen in the success of a scheme is in favour of that vigilance which would tend to diminish the number and severity of the accidents, and the fact that there has been an absence of litigation in the settlement of claims, are also justly to be considered as advantages offered by the schemes.'

Though the Registrar's certificate is to be given for a period of not less than five years, it may be revoked under Sec. 3 (4).

Sec. 3. (3.) (3.) No scheme shall be so certified which contains an obligation upon the workmen to join the scheme as a condition of their hiring.

The intention of this sub-section is obvious, but it is likely to be of little use. Though the scheme itself must not contain such an obligation, there is nothing to prevent an employer from refusing to employ any workman who is unwilling to accept the scheme, or from dismissing any one in his employment who refuses to do so. Whether such conduct would be a 'satisfactory reason' for revoking the certificate upon a complaint to the Registrar under Sec. 3 (4) or not, would be a matter for the Registrar to decide.

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From this sub-section it is clear that the question as to how many of the workmen would be willing to join in the scheme is immaterial. The Registrar has to 'ascertain the views of the employer and workmen.' Having done this, the sole test of the scheme is whether the benefits given by it are 'on the whole not less favourable to the general body of workmen and their dependants than the provisions of the Act,' quite irrespective of the number of workmen who are willing to join in it. It is a misapprehension to think that the Registrar would be guided by the opinion of the majority of the workmen. In fact, as pointed out by him, it would be quite competent for him to certify a scheme for a single workman only, if all the other workmen dissented from it.

Sec. 3. (3.)

(4.) If complaint is made to the Registrar of Friendly Societies by or on behalf of the workmen of any employer that the provisions of any scheme are no longer on the whole so favourable to the general body of workmen of such employer and their dependants as the provisions of this Act, or that the provisions of such scheme are being violated, or that the scheme is not being fairly administered, or that satisfactory reasons exist for revoking the certificate, the registrar shall examine into the complaint, and, if satisfied that good cause exists for such complaint, shall, unless the cause of complaint is removed, revoke the certificate.

Sec. 3. (4.)

BY OR ON BEHALF OF THE WORKMEN.—The use of the plural here shows that it is not intended that the Registrar shall 'examine into the complaint' of a single workman on his own behalf only. The complaint must be on behalf of the workmen. Still it can hardly mean that the complaint must be made by or on behalf of *all* the workmen, for, if so, one

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Sec. 3. (4.) workman, by refusing to join in the complaint, could prevent it from being examined into. It will probably be held to be a matter that rests with the Registrar, and that he is to be the judge as to whether the complaint is made 'by or on behalf of the workmen' or not.

SATISFACTORY REASONS.—For what is suggested to be a satisfactory reason, see note under Sec. 3 (3) (p. 56).

The Registrar is the sole judge as to whether the reasons are satisfactory or not. It is a useful provision that a certificate may be revoked if 'satisfactory reasons' exist, as the employer is in no way a guarantor of the solvency of the scheme. As soon as a scheme is certified, the employer only becomes 'liable in accordance with the scheme.' But it might happen that the sums set apart for the scheme were not large enough to pay all the calls upon it. In such case the employer would not be liable to make up the deficiency, but it is submitted that such a state of affairs would be a 'satisfactory reason' for revoking the certificate.

Sec. 3. (5.) (5.) When a certificate is revoked or expires any moneys or securities held for the purpose of the scheme shall be distributed as may be arranged between the employer and workmen, or as may be determined by the Registrar of Friendly Societies in the event of a difference of opinion.

Sec. 3. (6.) (6.) Whenever a scheme has been certified as aforesaid, it shall be the duty of the employer to answer all such inquiries and to furnish all such accounts in regard to the scheme as may be made or required by the Registrar of Friendly Societies.

Sec. 3. (7.) (7.) The Chief Registrar of Friendly Societies shall include in his annual report the particulars of the proceedings of the registrar under this Act.

By Sub-section 5 power is given to the Registrar, in default

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of agreement between the employer and his workmen, to distribute between them the funds held for the purposes of any scheme which is deprived of its certificate. Sec. 3. (7.)

With regard to Sub-section 6, the Chief Registrar of Friendly Societies, in his report on the first six months of the working of the Act, says:—'This provision is of great importance, as it is only by collecting and recording statistics of the experience gained under the schemes certified, that the questions whether a certificate ought to be renewed or whether some modifications in it should not be required, can be answered when the limited period has expired for which the certificates are granted.' Such returns will be found in the report for the year ending 1899.

PAYMENTS BY FRIENDLY SOCIETIES.—It was evidently expected by the Legislature that many schemes would provide for the payment of compensation by a Friendly Society, for by Schedule I. (15) it is provided that, where such is the case, certain sections (namely Sec. 8 (1), Sec. 16, Sec. 41) of the Friendly Societies' Act, 1896,[1] which put limitations on the amount of annuities, etc., shall not apply to such Society in respect of such scheme. See note to Schedule I. (15), p. 210.

By Sec. 8 (2) it is provided that the Treasury may frame a scheme with a view to its being certified under the Act. From the report of the Chief Registrar of Friendly Societies of the first six months of the working of the Act, it appears that such a scheme was framed, and the workmen were given the same opportunity of expressing their views as is given to the workmen of any employer; and consequently a statement of the scheme was suspended in every Government workshop. The scheme was certified on 17th May 1899. See notes under Sec. 8 (2), at p. 162.

4. Where, in an employment to which this Act applies, the undertakers as hereinafter defined contract with any person for the execution by or under such contractor of any work, and the under- Sec. 4. Sub-contracting.

[1] 59 and 60 Vict. c. 25.

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Sec. 4. takers would, if such work were executed by workmen immediately employed by them, be liable to pay compensation under this Act to those workmen in respect of any accident arising out of and in the course of their employment, the undertakers shall be liable to pay to any workman employed in the execution of the work any compensation which is payable to the workman (whether under this Act or in respect of personal negligence or wilful act independently of this Act) by such contractor, or would be so payable if such contractor were an employer to whom this Act applies.

Provided that the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of this section.

This section shall not apply to any contract with any person for the execution by or under such contractor of any work which is merely ancillary or incidental to, and is no part of, or process in, the trade or business carried on by such undertakers respectively.

OBJECT OF THIS SECTION.—The object of this section is to make an undertaker liable to a workman engaged on any work, which is either a part of or process in the trade or business carried on by the undertaker, even though that workman is in the employment of a contractor who has contracted with the undertaker to do that particular part of the work. In other words, the section makes the undertaker

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primarily liable for injuries received by a workman who is not in his own employ, but who is employed by a contractor under him. This introduces a new law which will be very beneficial to workmen. Sec. 4.

Under the general law, an undertaker or contractor who sublets to an independent sub-contractor, is not responsible to others for the acts or defaults of that sub-contractor; that is to say, an undertaker or contractor, by subletting a contract, could wash his hands of all responsibility in respect of accidents occurring on the work he had sublet. So that, if a sub-contractor were a man of straw, the result was, that a workman's remedies at common law or under the Employer's Liability Act[1] were useless to him, and though he was injured upon the work of an important undertaking, he got no compensation because he was the immediate servant of an impecunious sub-contractor, and his remedy lay against that sub-contractor, and against him only.

It was undoubtedly to meet this state of things that Sec. 4 was inserted in this Act, and the effect of it is to make an undertaker liable to the workmen engaged on the work (provided the employment is one to which the Act applies) in all cases, whether the injured workman is in his own employ or not, and whether a contractor or sub-contractor is employed or not. Such being the effect of the section, a workman will no longer be deprived of compensation because a contractor or sub-contractor, who happens to be his immediate employer, is unable to pay it, as he now has a remedy against the undertaker.

UNDERTAKER AND CONTRACTOR.—These words, as used in this section, are confusing. 'Undertaker' probably means the original contractor who contracts for the whole of the work; and 'contractor' probably means a contractor with the undertaker for a portion of the work. In other words, 'contractor' in this section will usually mean 'sub-contractor,' and 'undertaker' will usually mean 'contractor.' Of course, if a man undertakes building or other operations for himself, then he is rightly called the undertaker, and the person to whom he lets a portion of the work by contract

[1] 43 and 44 Vict. c. 42

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Sec. 4. is rightly called the contractor; but as a general rule the undertaker is, as pointed out above, really the contractor who contracts for the whole of the work.

For instance, if A, a builder, contracts with B to erect a house for him, A is the 'undertaker' and not B. If A sublets a portion of the contract to C, and one of C's workmen is injured, the injured workman can claim compensation from A by reason of this section. Beyond this the section does not go. It does not give any claim for compensation against B for whom the house is being built, but who himself does not engage in, and undertake the work (*M'Gregor* v. *Dansken*, 36 S.L.R. 393).

But if the two characters in the above illustration are united, that is to say, if B builds a house for himself, in the sense not merely that he is to pay for it, but that he is actually constructing it and his own men are doing the mason and joiner work, then B is the undertaker; and if B contracts with various contractors for the execution of other branches of the work, then he is liable to pay compensation for any injuries happening to any workmen in the employ of such contractors (*Stalker* v. *Wallace*, 37 S.L.R. 898). Thus it will be seen that the undertaker may be either a man who himself undertakes the work, or a contractor who contracts with him to do it.

BY OR UNDER SUCH CONTRACTOR.—The marginal note to this section is 'sub-contracting,' though the section itself does not mention sub-contracts, but only contracts made with undertakers. But since, as has been pointed out above, the undertaker will generally be a contractor, the person with whom he in turn contracts will be a sub-contractor; and therefore the provisions of the section will apply to sub-contracts, and the words 'by or under such contractor' will include cases where workmen are employed by sub-contractors. This being so, an undertaker becomes liable to all the workmen engaged on the work, whether the workmen themselves are employed by contractors or sub-contractors. For instance, if A, an undertaker, contracts with B, C, and D for the

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execution by them of portions of a work which are parts or processes in A's business, and if B, C, and D sublet portions of their contracts to X, Y, and Z, then A becomes primarily liable, if liability under the Act exists, to all the workmen engaged on the work, whether they are in the service of B, C, or D, or of X, Y, or Z. Sec. 4.

EXTENT OF UNDERTAKER'S LIABILITY.—For the undertaker to be liable, the workman must be employed in an employment to which the Act applies, and the work contracted for must be such that if it were done by workmen in the service of the undertaker, he would be liable to pay compensation under the Act. Under such circumstances, the undertaker becomes liable to pay compensation in the following cases :—

(1) Where the contractor *is* liable, either under the Act or independently of it, *i.e.* whether under this Act, or under the Employer's Liability Act,[1] or at common law.

(2) Where the contractor *would have been* liable if he had been an employer to whom the Act applies.

The result of this is, that the undertaker is made responsible to pay any damages that the contractor is liable for, or any compensation that the contractor would have been liable to pay had he been an undertaker. Consequently the undertaker may have to pay compensation to a workman in the service of a contractor, even though the workman is not directly employed in an employment to which the Act applies, and consequently has no claim for compensation against the contractor. That is to say, the undertaker's liability is not measured by that of the contractor, because he is liable to pay such compensation as 'would be payable' by the contractor 'if such contractor were an employer to whom the Act applies.' For instance, in *Bee* v. *Thomas Ovens and Sons* (37 S.L.R. 328), where a carter in the employ of a carting contractor was injured within the precincts of a factory when he was bringing raw material to the factory for use therein, it was held that the

[1] 43 and 44 Vict. c. 42.

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Sec. 4. occupiers of the factory were liable under this section to pay compensation to the workman notwithstanding that he, being employed as a carter by a carting contractor, was not directly engaged in an employment to which the Act applies.

LIABILITY OF SUB-CONTRACTOR.—Can a sub-contractor be made liable in the first instance, or must the claim be made against the undertaker? From the definition of 'undertaker' given in Sec. 7 (2), it appears to be the intention of the Legislature to give an injured workman a remedy against the person who has undertaken the whole work, and to make him primarily responsible for all the workmen employed on the work. It is noticeable that the Act deals only with the indemnification of undertakers by sub-contractors, and not with the indemnification of sub-contractors by undertakers. If the Legislature had intended both the undertaker and the sub-contractor to be primarily liable to the workman, it would be thought that the Act would have given a right of indemnity to the sub-contractor against the undertaker, just as it has given a right of indemnity to the undertaker against the sub-contractor. As it has not done so, it would appear that the sub-contractor is not primarily liable under the Act, and that the claim must in all cases be made against the undertaker.

In *Cass* v. *Butler* ([1900] 1 Q.B. 777; 82 L.T.R. 182; 16 T.L.R. 227) the respondent was the widow of a painter, who was killed while in the employment of the appellant. The facts were shortly these: An electrical station, which was over thirty feet in height, was being built for the Leeds Corporation by a builder named Gould, who had contracted for the erection of the whole building; the painting work had been sublet by Gould to the appellant. While employed in painting the girders in the interior of the roof, using for that purpose the scaffolding erected by Gould, the deceased met with a fatal accident owing to the breaking of one of the planks of the scaffolding.

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On these facts it was held that the sub-contractor was not an 'undertaker,' and was therefore not liable under the Act to pay compensation; in fact, the claim had been made against the wrong man—it ought to have been made against Gould. 'The question is,' said Smith L.J., 'whether a sub-contractor for the painting work is an undertaker within the meaning of the Act, so that the injured workman has an option to sue either the sub-contractor or the original contractor—that is, the undertaker. It is contended that both the appellant and Gould were undertakers; but that is not the meaning of the Act at all. "Undertakers" are defined in Sec. 7 (2) as being, in the case of a building, "the persons undertaking the construction, repair, or demolition." Who satisfies that definition in the present case? Clearly Gould, and Gould alone.' Sec 4.

From this decision, it may be laid down as a rule, that in all cases it is the undertaker, and the undertaker alone, who is directly liable to pay compensation for injury to a workman, whether that workman was in his own employ or in the employ of a contractor with him, and that in no case can the contractor with the undertaker be made primarily liable under this Act. Whether an undertaker who is made liable to pay compensation to a workman in the service of a contractor with him, has a right of indemnity against that contractor, is discussed on p. 67.

CAN A SUB-CONTRACTOR BE AN UNDERTAKER?—In *Cass* v. *Butler* (*supra*) the Court of Appeal held that where a builder had contracted with the building owner to do the whole of the work, he, and he alone, was the 'undertaker' within the definition in Sec. 7 (2), and that his sub-contractor was not an 'undertaker' within the meaning of the Act, and therefore was not liable to pay compensation. 'A sub-contractor is, in my opinion,' said Smith L.J., 'not an undertaker within the meaning of the Act.'

It would seem, then, that under no circumstances can a sub-contractor become an undertaker. Yet this section speaks of an undertaker being 'liable to pay to any workman

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Sec. 4. employed in the execution of the work any compensation which *is* payable (whether *under this Act* or in respect of personal negligence or wilful act independently of this Act) *by such contractor.*' As 'contractor' in the section means 'contractor with the undertaker' or sub-contractor, if the sub-contractor can never become an undertaker, there can never be any compensation payable by him *under this Act*, as it is only undertakers who are liable to pay directly to the workman. This seems strange, and it would have been thought that a sub-contractor, if he himself were undertaking part of the construction of a building or other kind of work within the Act, would be an undertaker, and be liable to pay compensation *under this Act.* But it appears from the decisions in the Court of Appeal that he is not liable to pay compensation, as he is not an undertaker.

This is the effect of the decisions in *Cass* v. *Butler* (*supra*) and *Cooper* v. *Davenport — Winstanley, Third Party* (16 T.L.R. 266). In the latter case the applicant was the widow of a deceased workman, who had been in the employment of the appellant Winstanley. The respondent Davenport was a builder, who had entered into a contract with the Warrington Guardians to build a workhouse infirmary. Davenport sublet the plumbing work of the building to Winstanley, by whom the deceased man Cooper was employed, and whilst at work on a scaffold on some of the plumbing work, the scaffolding gave way and he fell and was killed. The building at the time exceeded thirty feet in height and was being constructed by means of a scaffolding. The deceased man's widow claimed compensation from Davenport, and Davenport thereupon claimed to be indemnified by Winstanley under this section. The County Court Judge made an award in favour of the widow as against Davenport, and ordered Winstanley to indemnify Davenport.

The Court of Appeal allowed an appeal, and Smith L. J. said:—'It has been decided in *Cass* v. *Butler* that a sub-contractor is not an undertaker within the Act. I see no grounds for quarrelling with the reasons that were given in that decision. A person can only be liable to pay compensation under the Act if he is an undertaker. A sub-contractor

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is not an undertaker, and is therefore not liable to pay compensation under the Act.' Sec. 4.

This case appears to set the matter at rest, and it may now be stated as settled law that a sub-contractor—*i.e.* a contractor with the undertaker—*can not* be an undertaker.

However, it ought to be mentioned, that the Judges who framed the rules evidently thought that he could be. Rule 23 clearly contemplates that he can, and that both the undertaker and sub-contractor can be made respondents, an instance which actually occurred in *Appleby* v. *Horseley Co., Ltd., and Lovatt* ([1899] 2 Q.B. 521; 80 L.T.R. 853; 15 T.L.R. 410). The facts of the case were these: A workman was killed by an accident while in the employment of the Horseley Co., and the claim was made by his widow. Certain alterations were being carried out at the Leicester Station of the Midland Railway; the contractor for the works was Lovatt; the Horseley Co. were sub-contractors for the bridge work, and the claim was brought against the contractor and sub-contractor jointly. The question of the liability of the sub-contractor was not discussed, as the notice claiming indemnity required by Rule 19 had not been served by the undertaker upon the sub-contractor. But it would now appear from the decisions in *Cass* v. *Butler*, and *Cooper* v. *Davenport*, that even if such notice had been served the sub-contractor would not have been held liable.

UNDERTAKER'S INDEMNITY.—The Act says that the undertaker shall be entitled to be indemnified by 'any other person who would have been liable independently of this section.' It is therefore important to consider in what cases a contractor with the undertaker would have been liable independently of this section. The section seems to contemplate that he may be liable in two ways:—

(1) Under this Act.

(2) In respect of personal negligence or wilful act independently of this Act.

(1) **UNDER THIS ACT.**—The Court of Appeal have held in *Cass* v. *Butler* (*supra*) that a contractor with the undertaker does not himself become an undertaker, in the sense of being directly liable to a workman in his employ. If the decision

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Sec. 4. stopped there, little need be said of it, as it merely makes the undertaker primarily responsible to all workmen engaged on the work, even though they may be in the employment of a contractor with him. But in *Cooper* v. *Davenport* (*supra*) this decision was carried further, and it was held that as a contractor with the undertaker was not liable to pay compensation under the Act, he was not liable to indemnify any other person liable to pay. If this is to be settled law, then no sub-contractor is in any way affected by the provisions of the Act—that is, all his responsibility is thrown on the shoulders of the undertaker; and the undertaker has no remedy against him, unless the injury was caused under such circumstances as to make the sub-contractor liable under the Employer's Liability Act[1] or at common law. But this appears to be contrary to the wording of the Act itself. There appears to be a distinct conflict between the intention of the Legislature and the interpretation of the Court of Appeal. This section speaks of compensation which *is* payable by a contractor with the undertaker under this Act. If the interpretation placed upon the section by the Court of Appeal in *Cooper* v. *Davenport* (*supra*) be correct, the words 'whether under this Act,' in brackets in the section, have no meaning. Yet, being there, it was clearly in the contemplation of the Legislature that, under certain circumstances, a contractor with the undertaker would be liable under this Act, though not necessarily primarily liable to the workman, for this section places the undertaker in that position. Supposing A contracts with a building owner for the erection of a row of cottages. A at once becomes the undertaker. Supposing he sublets all the joinering work in connection with the undertaking to B, and supposing B engages his own men to carry out his portion of the work. If one of B's men is injured, then, owing to the provisions of this section, he can claim compensation from A, because A, being the original undertaker, is by this section made responsible for accidents happening to B's workmen. But supposing this section had not been in the Act, would B have been liable to pay compensation? It is thought that he would, for he would have

[1] 43 and 44 Vict. c. 42.

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been a person undertaking the construction of a building within the meaning of Sec. 7 (2). If so, then A would be entitled to be indemnified by B, because B 'would have been liable independently of this section.' Sec. 4.

This view, though contrary to the decisions of the Court of Appeal, is supported by a reference to the Rules and Forms. Rule 23 (2) states that 'where both the undertakers and a contractor with them are made respondents to an arbitration, *and it is decided in such arbitration that the contractor is liable to pay compensation under the Act*, the Judge may . . . make an award . . . in favour of the undertakers against the contractor.'

In Form 13, which is a notice by a respondent to third parties, there appears the following: 'The respondents claim to be indemnified by you against their liability to pay such compensation, on the ground that at the time of the injury in respect of which compensation is claimed the said A. B. was not immediately employed by the said C. D. and Co., but was employed by you in the execution of work in respect of which the said C. D. and Co. had contracted with you for the execution thereof by or under you, *and that you would, independently of Section 4 of the said Act, have been liable to pay compensation.*'

These extracts show clearly that the Rule Committee understood the intention of the Legislature to be something quite different from the interpretation given in *Cass* v. *Butler* and *Cooper* v. *Davenport* (*supra*). They thought that the intention was this: The section makes the undertaker liable where, but for the section, the contractor would have been liable. But having made the undertaker liable, it gives him a right to an indemnity against the contractor, whom he can bring into the arbitration proceedings by a third party notice (Rules 19-23).

The concluding words of the section also support the view that, under certain circumstances, the contractor would have been liable to pay compensation independently of the section. They state that the undertaker is to pay to the workman '*any compensation which is payable to the workman . . . under the Act . . . by such contractor*, or would be so

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Sec. 4. payable if such contractor were an employer to whom this Act applies' (*i.e.* if such contractor were an undertaker). This clearly contemplates that cases will arise in which the contractor would have been liable to pay compensation independently of the section (*i.e.* cases in which the contractor was an undertaker), as well as cases in which he would not have been liable, because he was not an undertaker. In both cases the undertaker is made liable, but it would certainly appear that he is entitled to an indemnity in the first case.

The whole difficulty arises from the decision of the Court of Appeal that a contractor with an undertaker can, under no circumstances, himself become an undertaker. Might not the proper construction to be put upon the section be this? The section makes the undertaker directly liable to all workmen in the employ of his contractor. Consequently his contractor is not directly liable to pay compensation to them, and is therefore not an undertaker in that sense. But he may be an undertaker for the purposes of determining his liability to indemnify the original undertaker for the compensation he has to pay by reason of this section. This construction would do away with all the difficulties referred to. If the workman commenced arbitration proceedings against the undertaker, the undertaker could bring in his contractor as a third party, and the question of the liability of the contractor to indemnify under this Act could afterwards be determined as is contemplated in the Rules.

The result of the matter seems to show that the Legislature and the Judges, who framed the Rules under the Act, contemplated the contractor indemnifying the undertaker when the latter has to pay compensation under the Act. The Court of Appeal has, however, put a different interpretation on the section, namely, that the indemnity clause is to apply only in cases where the contractor is liable to pay damages independently of the Act. Arbitrators and all persons dealing with the Act must of course follow the interpretation of the Court of Appeal, but it is to be hoped that, either the section will be simplified by the Legislature or that a test case will be taken to the House of Lords, as the interpretation

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placed upon it by the Court of Appeal does not appear to carry out the intention of those who were responsible for it. Sec. 4.

(2) **IN RESPECT OF PERSONAL NEGLIGENCE OR WILFUL ACT INDEPENDENTLY OF THIS ACT.**—If the contractor would have been liable at common law, or under the Employer's Liability Act,[1] the undertaker has the right of indemnity against him given by this section. Consequently, though this section imposes a fresh liability upon undertakers, in making them liable for injuries for which their contractors alone are liable at common law and under the Employer's Liability Act,[1] yet in both these cases the undertaker is entitled to his indemnity.

HOW THIRD PARTY PROCEDURE AFFECTS CONTRACTOR.—The procedure to be adopted when a claim to an indemnity is made against a third party will be found in Rules 19-23. These rules have been framed, as pointed out in the Explanatory Memorandum (p. 256), on the assumption that the third party procedure can only be applied, for the purpose of providing that a sub-contractor shall not be entitled in any future proceedings to dispute the validity of an award made against the undertaker. That is to say, the third party procedure is expressly limited so as to make it bind the third party, only as to the validity of the award against the undertaker, and not as to the third party's liability to indemnify the undertaker. This was necessary, as an arbitration under this Act is a very different thing from an action. The question whether the contractor is liable to the workman under the Employer's Liability Act[1] or at common law, is a very different one from the question whether the undertaker is liable under this Act. The contractor, if sued under the Employer's Liability Act,[1] would be able to raise any defence open to him under that Act, such as contributory negligence on the part of the workman, a defence which is not open to an undertaker under this Act. He could not be compelled to submit this question to the Arbitrator at the hearing of the arbitration, as he is entitled to have it decided by a jury. The issues between the workman and the undertaker would also be very different from

[1] 43 and 44 Vict. c. 42.

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Sec. 4. those between the undertaker and the contractor, and consequently the Rules do not empower the Arbitrator, except by consent, to decide the question of the liability of the contractor under the Employer's Liability Act[1] or at common law; they only enable the undertaker to bring in the contractor as a third party so as to prevent him from afterwards disputing the validity of the award.

PROCEDURE WHEN INDEMNITY CLAIMED.—Though no third party procedure is provided in the Act itself, Rules 19-23 of the Workmen's Compensation Rules give directions as to the course to be adopted when a claim to indemnity is made against a third party.

Where a respondent claims to be entitled to an indemnity against a third party, he must file, five clear days before the arbitration, a notice of his claim, and serve the same upon the person against whom such claim is made (Rule 19). If the person served makes default in appearing, he is to be deemed to admit the validity of any award made against the respondent (Rule 20). On an application being made to him, the Arbitrator may give the third party leave to resist the claim of the applicant against the respondent upon such terms as may be just; and if the third party obtains leave to resist the claim, the Arbitrator has the same power to award costs as between the applicant and the third party, as he has to award costs between the applicant and the respondent (Rule 21).

The form to be used when an indemnity is claimed is Form 13 (p. 302).

HOW FAR ARBITRATOR EMPOWERED TO DECIDE LIABILITY OF THIRD PARTY.—Apart from the consent of the respondent and the third party, the Arbitrator is not empowered, except in the case mentioned below, to decide any question as to the liability of the third party to indemnify the respondent, or to make any award in favour of the respondent against such third party. All he is empowered to do is to make an order that the third party shall not be entitled, in any future proceedings between the respondent and such third party (*e.g.* when the respondent brings an

[1] 43 and 44 Vict. c. 42.

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action for an indemnity), to dispute the validity of the award Sec. 4. (Rule 22 (1)).

But, with the consent of the respondent and the third party, if the arbitration results in an award in favour of the applicant, and the third party admits his liability to indemnify the respondent, the Arbitrator is empowered to make such award in favour of the respondent against the third party. Also, with the like consent, the Arbitrator, on an application for directions under Rule 21, can order any question as to the liability of the third party to make the indemnity claimed to be settled, as between the respondent and the third party, by arbitration after the arbitration between the applicant and respondent, and may, on such subsequent arbitration, make an award in favour of either party against the other (Rule 22 (2)).

In one case, according to the Rules, an award can be made against the contractor in favour of the undertaker without the contractor's consent. This is when both the contractor and undertaker are made respondents, and it is decided in the arbitration that the contractor is liable to pay compensation under the Act (Rule 23). But as long as *Cooper* v. *Davenport* (*supra*) remains undisturbed, this provision will be of no avail, because it was decided in that case, that, as the contractor with the undertaker is not himself an undertaker, he is not liable to pay compensation under the Act, and consequently is not liable to indemnify any other person who is liable under the Act.

WHERE UNDERTAKER HAS NO RIGHT OF INDEMNITY.—As the undertaker is, by this section, made liable to pay compensation which would have been payable by the contractor had he been an employer to whom the Act applies. in such a case he clearly has no right to an indemnity. If the contractor is not an employer to whom the Act applies, and if he is not liable under the Employer's Liability Act[1] or at common law, he is clearly not liable 'independently of this section,' and consequently the undertaker cannot seek an indemnity against him. See *Bee* v. *Thomas Ovens and Sons* (37 S.L.R. 328) at p.63.

NOTICE REQUIRED WHEN INDEMNITY CLAIMED.—Rule 19

[1] 43 and 44 Vict. c. 42.

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Sec. 4. provides that where a respondent claims to be entitled over against any person not a party to the arbitration, he must, five clear days before the day fixed for proceeding with the arbitration, file a notice of his claim and serve the same on the person against whom he claims. A similar notice must be filed when both the undertakers and a contractor with them are made respondents, so that if the undertakers claim under this section to be entitled to an indemnity against the contractor, they must under Rule 23 file a notice of their claim in the same manner as is prescribed by Rule 19; otherwise their claim to an indemnity cannot be considered (*Appleby* v. *Horseley Co., Ltd.* [1899] 2 Q.B. 521; 80 L.T.R. 853; 15 T.L.R. 410). 'The question for us,' said Smith L.J., 'is whether, where both the undertakers and a contractor are made respondents, the undertakers can obtain an order for an indemnity against the contractor without giving him notice under the rules of their claim to be indemnified. The right to indemnity is given by Sec. 4 of the Act, which in substance provides that where the undertakers contract with any person for the execution of the work, they shall be liable for accidents to the contractor's workmen, with a proviso that they shall be entitled to be indemnified by any other person who would have been liable independently of that section. The procedure for giving effect to this provision appears in the Rules made under the Act. Rule 23 (1) which deals with a claim to indemnity as between respondents, provides that a like notice may be issued and the like proceedings adopted as if the respondent, against whom indemnity is sought, were a third party; that takes us back to Rule 19, which makes it obligatory on the respondent to file a notice of his claim to an indemnity five clear days before the day of hearing, and to serve it upon the third party. In my judgment Rule 23 (1) means that, whether the person against whom indemnity is sought is a third party and altogether outside the proceedings, or whether he is one of the respondents, the claim to an indemnity must be started by a five days' notice under Rule 19; if the indemnity procedure is invoked at all, that notice must be given.'

WHERE THERE ARE INDEPENDENT CONTRACTORS.—Where

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there are independent contractors, each of whom contracts separately with the building owner to do a separate and substantial part of the work of construction, each is an undertaker within the meaning of the Act (*Mason* v. *Dean* [1900] 1 Q.B. 770; 82 L.T.R. 139; 16 T.L.R. 212). In this case there was a builder who contracted with the building owner to build a theatre, and who was of course an undertaker; but power was reserved to the building owner in the contract, to take a portion of the work of construction out of the builder's hands and to let that portion directly to another person; this was done, and it was held that the person who took the latter contract, not being a sub-contractor, came within the Act, for he had contracted with the building owner for a part of the construction of the theatre, and was the undertaker for that part within the meaning of the Act. Sec 4.

HOW APPLICANT SHOULD PROCEED.—Though it has been stated above that the applicant should always proceed against the original undertaker, there is nothing to prevent him from joining the sub-contractor as a respondent. From the Rules dealing with the necessary notice to parties against whom an indemnity is claimed (Rules 19-23), it appears that there are two courses open to a workman who has been injured whilst in the service of a contractor with the undertaker, viz.:—

(1) To proceed against the undertaker, who can bring in the contractor as a third party (Rule 19); or

(2) To proceed against the undertaker and contractor jointly (Rule 23 (2)), in which case, if it is decided that the contractor is liable to pay compensation under the Act, the Arbitrator can make an award in favour of the undertaker against the contractor.

But, owing to the decisions of the Court of Appeal in *Cass* v. *Butler* and *Cooper* v. *Davenport* (p. 66), the latter course appears to be of no avail, as in those cases it was held that the contractor can, under no circumstances, become liable to pay compensation direct to the workman, and workmen are therefore advised, in all cases, to make their claims against the original undertaker and against him alone.

ANY COMPENSATION WHICH IS PAYABLE.—This includes

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Sec. 4. compensation both under the Act and independently of it—'whether under this Act, or in respect of personal negligence or wilful act independently of this Act.' But see p. 65.

ANCILLARY OR INCIDENTAL TO.—The provisions of this section as to making undertakers liable for injuries happening to workmen in the employ of their contractors, only apply when the undertakers employ a contractor to do some work which is not merely ancillary or incidental to, but which is some part of or process in the trade or business carried on by the undertakers. For instance, if a manufacturing company engaged a contractor to build them a warehouse, and one of the contractor's workmen was injured whilst engaged in the building operations, the company would not be liable to pay him compensation, because the building of a warehouse is 'merely ancillary or incidental to' the business carried on by the company, and is 'no part of or process in' such business.

Thus, in *Wrigley* v. *Bagley and Wright and Whittaker and Sons* ([1901] 1 K.B. 780; 84 L.T.R. 415), a workman in the employ of a firm of engineers was engaged in putting a new driving-wheel into the steam-engine of a factory owned by a cotton spinning firm when he was killed. It was held that the work on which the deceased was engaged was 'merely ancillary or incidental to,' and no part of or process in the business of the owners of the cotton spinning factory, and that therefore a dependant of the deceased workman was not entitled to compensation from them. 'Putting a new driving-wheel into an engine cannot,' said Romer L.J., 'be said to be part of or process in the business of the cotton spinners any more than building the factory in which they intend to carry on their business can be said to be a part of or process in that business.'

Another illustration of what is considered to be 'merely ancillary or incidental to' the business carried on by the undertakers is found in the case of *Pearce* v. *London and South-Western Railway Co.* ([1900] 2 Q.B. 100; 82 L.T.R. 487; 16 T.L.R. 336). Messrs. Perry and Co. had contracted with the railway company to do such work in the way of altering, repairing, and painting the Company's stations in the London district, as they might be directed to do by the Company's district engineer at prices fixed by a schedule.

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They were, under this contract, making alterations at Hampton Court Station, and Pearce, the applicant, was engaged upon the work there, when he met with the accident in respect of which he claimed compensation. It was held that the erection of a railway station was work which was 'merely ancillary or incidental to, and was no part of, or process in, the trade or business' of a railway company within the meaning of this section; and that therefore the railway company was not liable to pay compensation to a workman of a contractor, who had contracted with them to do such work, in respect of an injury which he received in the execution of it. 'I think it would be difficult,' said Collins L.J., 'to give a better illustration of what constitutes merely ancillary or incidental work, as distinguished from the actual business carried on by the undertakers, than that which is afforded by the present case. . . . The primary business of a railway company is to carry passengers and goods. The erection of stations does not appear to me to be any part of, or process in, that business.' **Sec. 4.**

On the other hand, in *Burns* v. *North British Railway Company* (37 S.L.R. 448), a railway company employed a firm of signal makers to erect signals on a new siding which they were in the course of constructing, and a workman employed by the signal makers was knocked down by a train and killed. It was here held that the deceased was employed on a railway of which the railway company were undertakers, and which was an essential part of their undertaking, and not 'merely ancillary or incidental' thereto.

But *Burns* v. *North British Railway Co.* (*supra*) was doubted, and *Pearce* v. *London and South-Western Railway Co.* (*supra*) followed in the later Scotch case of *Dundee and Arbroath Joint Railway* v. *Carlin* (38 S.L.R. 635), where a workman in the employment of a sub-contractor, who had a contract with the railway company to construct a wall to prevent the soil from the bank of a cutting from falling down and obstructing the access to a signal cabin, was killed by a passing train. It was here held (Lord Young dissenting) that the work on which the deceased was employed was not part of the business of the railway company, but was 'merely ancillary or incidental' thereto.

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Sec. 4.

Owing to the decision in *Fullick* v. *Evans, O'Donnell and Co., Ltd.* (see p. 145), that the word 'railroad' in the definition of 'engineering work' includes practically everything that is a necessary part of a railway as a going concern, it is submitted that if, in any of the three last mentioned cases, the applicant, instead of claiming from the railway company, had claimed from the contractor as being the undertaker of an 'engineering work,' he would have recovered compensation.

In *Greenhill* v. *Caledonian Railway Co.* (37 S.L.R. 524), a railway company charged through rates for the carriage of goods, including the collection and delivery of them, the collecting and delivery being done by a carting contractor. A man employed by the contractor was killed on the railway platform whilst engaged in transferring goods from a lorry to a train. It was held that the railway company were liable, as the work on which the carter was engaged was part of the business carried on by the company, and was not 'merely ancillary or incidental' thereto.

It has also been held that carting goods to and from a factory is part of the business carried on in the factory, and 'not merely ancillary and incidental' thereto (*Bee* v. *Thomas Ovens and Sons*, 37 S.L.R. 328; and at p. 63).

In *Lowe* v. *Lockwood and Neill and Sons* (109 Law Times 133), the deceased was employed as an asphalter by Lockwood, who was a sub-contractor in connection with the construction of some railway works, which were being carried out by Neill and Sons. Whilst working at a culvert which was being asphalted to keep it water-tight, a bucket of pitch fell on the deceased and he was killed. It was argued that Neill and Sons, the undertakers, were not liable under the Act, as the asphalting work was merely 'ancillary or incidental to and was not part of or process in the business carried on by them.' The Judge of the Manchester County Court, however, said that in his opinion the asphalting was an essential part of the contract, as it was necessary to make the culvert water-tight. He held that the contention, that asphalting was outside the responsibility of Neill and Sons could not be accepted, and he consequently made an award in favour of the widow.

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5.—(1.) Where any employer becomes liable under this Act to pay compensation in respect of any accident, and is entitled to any sum from insurers in respect of the amount due to a workman under such liability, then in the event of the employer becoming bankrupt, or making a composition or arrangement with his creditors, or if the employer is a company of the company having commenced to be wound up, such workman shall have a first charge upon the sum aforesaid for the amount so due, and the Judge of the County Court may direct the insurers to pay such sum into the Post Office Savings Bank in the name of the Registrar of such Court, and order the same to be invested or applied in accordance with the provisions of the First Schedule hereto with reference to the investment in the Post Office Savings Bank of any sum allotted as compensation, and those provisions shall apply accordingly.

Sec. 5. (1.) Compensation to workmen in case of bankruptcy of employer.

(2.) In the application of this section to Scotland the words 'have a first charge upon' shall mean 'be preferentially entitled to.'

Sec. 5. (2.)

This section contemplates that employers will insure against their liability under this Act.

STAMP DUTY PAYABLE ON POLICY OF INSURANCE.—Two cases came before a Divisional Court as to what stamp duty is payable on a policy of insurance, by which an Insurance Company agrees to pay, for or on behalf of the employers, such sums as they should become liable to pay under the Employer's Liability Act,[1] the Workmen's Compensation Act, or by the

[1] 43 and 44 Vict. c. 42.

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Sec. 5. (1.) common law, in respect of personal injury to any workmen in their employ. Both cases were stated, upon the application of the appellants, by the Commissioners of Inland Revenue.

In *Lancashire Insurance Co.* v. *Commissioners of Inland Revenue* ([1899] 1 Q.B. 353; 79 L.T.R. 731; 15 T.L.R. 119), the policy was an instrument under the seal of the company, and it will be found set out in (1899) 1 Q.B. on pp. 353 and 354. By it the Insurance Company agreed to pay, for and on behalf of the employers, such sums as they should become liable to pay under the Employer's Liability Act,[1] the Workmen's Compensation Act, or by the common law, in respect of personal injury to any workmen in their employ. The question arose whether this was a 'policy of insurance against accident' within the definition of Sec. 98 (1) of the Stamp Act, 1891,[2] in which case it would only require a penny stamp, or whether it was not. The definition of a 'policy of insurance against accident' given in Sec. 98 of the Stamp Act is 'a policy of insurance for any payment agreed to be made upon the death of any person only from accident or violence, or otherwise than from a natural cause, or as compensation for personal injury.'

Upon the ground that, in truth and substance the policy was a contract of indemnity, and the liability of the assured was the event upon which the liability of the assurer depended, it was held that the instrument was not 'a policy of insurance against accident' within the meaning of Sec. 98 of the Stamp Act, 1891,[2] and therefore was not chargeable with the duty imposed by that Act in respect of such policies, but was liable to duty as a deed. The effect of this decision is, that a policy of insurance against liability under this Act, if it is a deed under the seal of the Company, requires a 10s. stamp.

In *Vulcan Boiler and General Insurance Co.* v. *Inland Revenue Commissioners* ([1899] 1 Q.B. 353; 79 L.T.R. 731; 15 T.L.R. 119) the same point arose. The policy was practically the same in form but was not under seal. The Commissioners held that it was not "a policy of insurance against

[1] 43 and 44 Vict. c. 42. [2] 54 and 55 Vict. c. 39.

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accident' within the meaning of the Stamp Act, 1891,[1] and that it was therefore liable to the duty of sixpence as an agreement, which decision was upheld by the Divisional Court. Sec. 5. (1.)

WHERE ANY EMPLOYER BECOMES LIABLE.—These words only appear to apply to cases where the employer becomes bankrupt after his liability has been established. In such cases the workman is to have a first charge on any sum due from insurers to the employer in respect of the injury to the workman. No provision is apparently made for cases where the employer becomes bankrupt whilst proceedings under this Act are pending against him, but before his liability has been determined. But it is submitted that the section is intended to apply to such a case, as in reality the employer 'becomes liable' a fortnight after the accident, and it is only the extent of his liability that has afterwards to be determined.

IS ENTITLED TO ANY SUM.—These words also appear only to include cases where the employer has become bankrupt after his liability has been established, as he is not entitled to any sum from insurers until that event. But when he becomes bankrupt while proceedings are pending against him, if his liability to pay compensation is eventually established, there appears to be nothing to prevent the workman from claiming a first charge upon any sum due from insurers to the employer in accordance with Rule 51.

WHEN SUM DUE IS A WEEKLY PAYMENT.—Though this section appears to refer only to cases where there is a lump sum due to the workman, inasmuch as it speaks of 'such sum' being paid into the Post Office Savings Bank, it must be taken to include cases where the sum due to the workman is a weekly payment. A reference to Rule 55 shows that where the compensation payable to a workman is a weekly payment, and the employer is entitled to a weekly payment of the same, or any less amount, from insurers in respect of such amount, the Judge may order the insurers to pay such weekly payment direct to the workman.

CONDITIONS UNDER WHICH WORKMAN CAN OBTAIN PAYMENT FROM INSURERS.—To enable the workman to obtain

[1] 54 and 55 Vict. c. 39.

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Sec. 5. (1.) the benefit given by this section, the following two conditions must be satisfied :—

(1) The employer must be liable to pay compensation under the Act.

(2) The employer must be entitled to payment from insurers, in respect of the amount due to the workman.

The important question to consider, therefore, before taking proceedings under this section, is this :—Is the 'employer entitled to any sum from insurers in respect of the amount due to a workman?' If he is, the workman can proceed against the insurers; if he is not, the workman cannot so proceed, and he must be content with entering a proof in the employer's bankruptcy. Whether the employer is entitled to a sum from the insurers or not, depends upon the terms of the insurance policy. If under the policy the insurers simply take the place of the employer, and the employer during the continuance of the policy becomes liable to make weekly payments, the insurers will be liable for all future payments, whether the premiums continue to be paid or not, provided that the original liability was established during a period for which the premium had been paid. But if there is a provision in the policy that the liability of the insurers to the employer shall only continue so long as the employer pays the annual premiums, then, in the event of the employer becoming bankrupt, he will no longer be 'entitled to any sum' from the insurers, and consequently the workman will have no claim against the insurers. See *Leech* v. *Life and Health Assurance Association* ([1901] 1 K.B. 707; 84 L.T.R. 414; 17 T.L.R. 354).

PROCEDURE TO BE ADOPTED BY WORKMEN UNDER THIS SECTION.—For the method by which the workman is to obtain the money direct from the Insurance Company, see Rules 51 to 58 of the Workmen's Compensation Rules.

NO APPEAL FROM DECISION OF ARBITRATOR.—An appeal will not lie against the refusal of a County Court Judge to direct insurers to pay insurance money into the Post Office Savings Bank, in accordance with the provisions of this sub-section. Such a refusal is not a matter settled by an Arbitrator or by the County Court Judge within the meaning

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of Schedule II. (4), which clause alone gives a right of appeal from the decision of a County Court Judge. As proceedings under this section are not any part of an arbitration under the Act, but a matter altogether subsequent to the arbitration and award, and are rather in the nature of a garnishee proceeding, they do not come within Schedule II. (4), and therefore an appeal will not lie (*Leech* v. *Life and Health Assurance Association*, [1901] 1 K.B. 707; 84 L.T.R. 414; 17 T.L.R. 354). Sec. 5. (1.)

POST OFFICE SAVINGS BANK.—As to investments, see Schedule I. (8).

6. Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the workman may, at his option, proceed, either at law against that person to recover damages, or against his employer for compensation under this Act, but not against both, and if compensation be paid under this Act, the employer shall be entitled to be indemnified by the said other person. Sec. 6.

CHOICE OF REMEDIES.—Under this section a workman, who is injured under such circumstances as to make a stranger liable to him in damages, has a choice of remedies. He can either bring an action against the stranger, or claim compensation from his employer. But, before the passing of this Act, he could have brought an action against the stranger, and by Sec. 1 of this Act he is entitled to claim compensation from his employer, so that in reality this particular section gives him no new rights. What this section does, is to prevent him from both obtaining damages from a stranger and also compensation from his employer, in respect of the same injury.

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Sec. 6.

AT HIS OPTION.—As to the exercise of this option when the workman is dead, see p. 21, *ante*.

WHEN IS OPTION EXERCISED?—This section says that the 'workman may, at his option,' proceed either at law against that person (*i.e.* the stranger) to recover damages, or against his employer for compensation under the Act. When may the workman be said to have so proceeded against his employer as to be prevented from proceeding against the stranger? A mere notice of accident given under Sec. 2 is not a 'proceeding' against the employer within the meaning of this section, and a workman who has given such a notice is not thereby precluded from bringing an action against the person other than the employer, whose negligence caused the injury.

This was decided in *Perry* v. *Clements* (17 T.L.R. 525). Perry brought an action for damages for personal injuries, and the case was tried before Ridley J. and a jury, when a verdict was given for the plaintiff for £225. The case afterwards came on for further consideration. It appeared that the plaintiff, whilst on his employer's premises, was injured through the negligence of the defendant's servants, and that after the accident a notice of injury in accordance with Sec. 2 of the Workman's Compensation Act was served on the plaintiff's employers. No further proceedings under the Act were taken by the plaintiff, or claim for compensation made by him against his employers, as they voluntarily continued paying his wages. On further consideration, it was submitted on behalf of the defendant that judgment ought to be entered for the defendant, on the ground that the plaintiff had taken proceedings against his employers for compensation, and was therefore by this section estopped from recovering damages from the defendant in respect of the same injury. Ridley J. held that the notice of injury served on the employers was not a 'proceeding' under the Act, as it had not been followed by a claim for compensation, and in the absence of a claim for compensation there was no 'proceeding.' If the plaintiff had, however, made a definite demand for compensation from his employer, he would thereby have exercised his option, as it was held in *Powell* v. *Main Colliery Company* ([1900] A.C. 366; 83 L.T.R. 85; 16 T.L.R. 466) that the commencement

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of proceedings was not the request for arbitration but the 'claim for compensation' addressed to the employer. Sec. 6.

On the other hand, when may the workman be said to have so proceeded against the stranger as to be prevented from recovering compensation from his employer? In the case of an action at common law the commencement of the proceedings is the issuing of the writ. If, therefore, a workman issues a writ against the stranger he has clearly exercised his option. But supposing that the issuing of a writ becomes unnecessary, through the stranger agreeing to pay a sum to the workman in respect of the injury. Has the workman then 'proceeded' against the stranger? It is submitted that he has, because unless the stranger had agreed to pay damages the next step on the workman's part would have been the issuing of the writ, which shows clearly that he has exercised his option.

As pointed out in the next paragraph, it is submitted that even when the workman has 'proceeded' against one of the parties, he is not necessarily estopped from pursuing his remedies against the other party, if he has failed in his first 'proceeding.' The section appears to mean that the workman cannot pursue his remedies against both parties simultaneously, but it does not prevent him from pursuing them successively. That is to say, if, at the hearing of an action against the stranger, it appears that the workman has proceeded against his employer for compensation, he will be estopped and the action will not be tried. Similarly, if at an arbitration it is reported to the Arbitrator that an action is pending against a stranger in respect of the same injury, the workman will be estopped and the arbitration will not be held. But if he proceeds first against one of the parties and is unsuccessful, there appears to be nothing to prevent him from proceeding against the other party afterwards. The workman is put to his option, in the sense that he cannot pursue both remedies simultaneously, but it is submitted that he can pursue them alternatively, so long as he does not recover from both employer and stranger. See notes below under 'not against both.'

NOT AGAINST BOTH.—From these words it would appear that the workman cannot, if he brings an action against a stranger and fails to establish his right to damages, afterwards

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Sec. 6. pursue his remedy against his employer. The words are more emphatic than those used in Sec. 1 (2) (*b*), as they speak of the workman 'proceeding' against one or the other, but not against both. But in reality this section only applies when the injury was caused 'under circumstances creating a legal liability in some person other than the employer,' and if the workman proceeds against that 'other person,' and it is held at the trial of the action that he is not entitled to damages, then the injury was not caused 'under circumstances creating a legal liability in some person other than the employer to pay damages,' and consequently it would appear that this section does not apply. Could the workman afterwards, if still in time, claim compensation from his employer? It is submitted that he could, because, as pointed out above, this section is of no effect, except when the injury was caused 'under circumstances creating a legal liability' in some other person. The intention of the section appears to be, to prevent the workman from recovering both damages and compensation, and not to deprive him of the benefit of the Act, if he has proceeded against a third party and failed. The workman had always the right to proceed against the third party. If he exercises that right and fails in his action, his employer is in no way damnified, and why should the workman be prevented from then exercising the rights given him against his employer by this Act?

Sec. 1 (2) (*b*), which also gives an option to the workman, is different. It has been held that under that section a workman cannot proceed against his employer both independently of and also under this Act (*Edwards* v. *Godfrey*. See note under Sec. 1 (2) (*b*) on p. 23, *ante*). But under that section both proceedings are against the employer, and if the workman fails in his action, there is still a *locus pœnitentiæ* open to him under Sec. 1 (4). He can then and there apply to the Court to assess the compensation to which he would have been entitled under the Act. But under this section the action is against a stranger, and Sec. 1 (4) does not apply, as that sub-section only refers to actions against employers; so that, unless the workman can afterwards take proceedings for the recovery of compensation, there is no *locus pœnitentiæ*

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open to him. The result would be that the employer, who by this Act would be liable to pay compensation, would escape all liability if the workman chose to bring an action against a third party, whether he recovered any damages thereby or not. If the workman proceeds against the third party and succeeds, the employer is free from liability, as there is no right of indemnity given to the third party against the employer. Consequently it is greatly to the advantage of the employer that the workman should proceed against the third party. But if the workman does so proceed, and it is found that the third party is not legally liable, for the reasons given, it appears that he can, if still in time, make a claim for compensation against his employer. Sec. 6.

Similarly, if the workman claims compensation and it is decided in the arbitration that his employer is not liable under the Act, there is nothing in this section to prevent him from bringing an action against the stranger. If the workman fails to obtain compensation, the injury is not an 'injury for which compensation is payable under this Act' and the case is not within this section.

THE EMPLOYER SHALL BE ENTITLED TO BE INDEMNIFIED.—This does not mean that the employer will in all cases, where injury was caused to a workman of his by a stranger, be entitled as of right to be refunded any sum which he has had to pay as compensation. The right of indemnity against a stranger is given by this section, and this section only applies where the injury was caused 'under circumstances creating a legal liability' in the stranger to pay damages. Consequently the employer is only entitled to be indemnified by a stranger when the circumstances create a 'legal liability' in that stranger. When the employer brings an action for indemnity against a stranger, the stranger will be entitled to raise any defence to show that he was not legally liable 'to pay damages' for the injury caused. He could, for instance, raise the defence that the injury was caused through the contributory negligence of the workman, a defence which is not open to an employer under this Act, and if he succeeded in that defence, then it is clear that the injury did not arise 'under circumstances creating a legal liability' in him, and

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Sec. 6. consequently he would be under no liability to indemnify the employer. Hence it may happen, as in the case of sub-contractors (see p. 73), that an employer may have to pay compensation under this Act for an injury which was caused by a stranger, against whom he has no right of indemnity.

PROCEDURE WHEN INDEMNITY CLAIMED.—Though no third party procedure is provided in the Act itself, Rules 19-23 of the Workmen's Compensation Rules give directions as to the course to be adopted when a claim to indemnity is made against a third party. See note under Sec. 4 at p. 72.

Sec. 7. (1.) Application of Act and definitions.

7.—(1.) This Act shall apply only to employment by the undertakers as hereinafter defined, on or in or about a railway, factory, mine, quarry, or engineering work, and to employment by the undertakers as hereinafter defined on in or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished, or on which machinery driven by steam, water, or other mechanical power, is being used for the purpose of the construction, repair, or demolition thereof.

UNDERTAKERS.—The provisions of this Act only apply to employment by undertakers. No employer will be liable under it unless he is also the 'undertaker' as defined in Sec. 7 (2); but the 'undertaker' will be liable, whether he is the employer or not, for an accident happening to a workman who is engaged on his work. This is the effect of the provision contained in Sec. 4 of the Act. By that section, any undertaker who contracts with an independent contractor for the doing of part of his work (*e.g.* where a building contractor lets off portions of his work to sub-contractors), is liable for an injury that occurs to any workmen of the contractor whilst engaged in carrying out the work. Yet in such a case the

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undertaker is not the employer of the injured workman. The injured workman is in the employ of the contractor, to whom the undertaker has let off a portion of the work. Consequently an undertaker may often be made liable for injuries caused to a workman who is not in his own employ. Whenever an undertaker would have been liable to pay compensation if he had carried out the work by men in his immediate employment, he becomes, under this Act, liable to the workmen of a contractor who is carrying out the work for him. Sec. 7. (1.)

Again a workman may be injured 'on or in or about a railway, factory, mine, quarry, or engineering work' and yet be unable to recover compensation because his employer is not an 'undertaker.' Thus in *Francis* v. *Turner Brothers* ([1900] 1 Q.B. 478; 81 L.T.R. 770; 16 T.L.R. 105) a workman who had been sent by his employers from their own factory to bring some machinery from another factory, was injured in that other factory, but it was held that he could not recover compensation as his employers were not occupiers of that other factory and hence not 'undertakers.' See also *Malcolm* v. *M'Millan* (37 S.L.R. 383); *Abernethy and Co.* v. *Low* (37 S.L.R. 506); and *Purves* v. *L. Sterne and Co., Ltd.* (37 S.L.R. 696).

For further reference to the terms 'employer' and 'undertaker,' see note under Sec. 1 (1), p. 15.

For definition of 'undertaker,' see p. 148.

EMPLOYMENTS TO WHICH THE ACT APPLIES.—This Act applies to employment 'on or in or about'

I. A Railway.
II. A Factory.
III. A Mine.
IV. A Quarry.
V. An Engineering Work.
VI. Certain classes of buildings.

The first five of these employments are further defined in Sec. 7 (2), and each will be considered separately in the notes under that sub-section. But there is one qualification common to all the employments, and it may therefore be considered now. The words 'on or in or about' refer to them all.

ON OR IN OR ABOUT.—The employment must be 'on or in

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Sec. 7. (1.) or about' one of the works mentioned above. The effect of this provision is, that the liability of the undertaker is limited to such accidents as happen on or in the place where his business is carried on, or in places in close proximity to it.

This was decided in *Powell* v. *Brown* ([1899] 1 Q.B. 157; 79 L.T.R. 631; 15 T.L.R. 65), where a workman was killed whilst engaged in loading a cart belonging to the owners of a factory. The cart was standing in the street, close to the entrance of the factory yard, in a position in which it was usually loaded with timber from the factory. Powell was occupied in arranging timbers on the cart, when a piece of timber accidentally tilted and threw him on the road, causing injuries from which he died. It was held that though the employment was not 'on' or 'in' the factory, it was 'about' it, and it therefore came within the meaning of this section. 'It is obvious,' said Smith L.J., 'that the Legislature thought that the first two words were not large enough to cover all that they intended to include, and they therefore added the word "about," which is clearly an enlarging word. In my view, that word means that the employment may be in close propinquity to the factory, and whether that was so in any particular case is a question of fact to be determined by the tribunal before which the claim comes. The Judge in this case has found that the deceased was employed "about" the factory, and this brings the case within the statute.' See also *Strain* v. *William Sloan and Co.* (38 S.L.R. 475).

But where a carter, in the employment of the owners of a factory, was injured whilst unloading goods from a cart belonging to his employers at a distance of a mile and a half from the factory, it was held that the County Court Judge had rightly found that employment at such a distance was not employment 'about' a factory (*Lowth* v. *Ibbotson* [1899] 1 Q.B. 1003; 80 L.T.R. 341; 15 T.L.R. 264). *Powell* v. *Brown* (*supra*) was followed, the Court again saying that it was a question of fact in each case for the Arbitrator to decide whether the employment was 'about' a factory or not.

But though it is a question of fact for the Arbitrator to decide whether the employment was about a factory or not, if there is no evidence to support his finding of fact, his

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decision will be reversed. This occurred in *Fenn* v. *Miller* Sec. 7. (1.) ([1900] 1 Q.B. 788; 82 L.T.R. 284; 16 T.L.R. 265). A builder was erecting houses on a building estate which was in the course of development; on the estate was a barn containing a steam-engine and mortar-mill which were used for the purposes of the building operations, and which, according to the decision in *M'Nicholas* v. *Dawson* (p. 136, *post*), constituted a factory within the meaning of this section. Miller, a labourer in the builder's employment, whose duty it was to fetch water in a cart from a brook at some distance along the main road for the mortar-mill and building, was injured while returning with the cart at a spot about 110 to 160 yards distant from the engine and mortar-mill, owing to the horse running away. The County Court Judge held that at the time of the accident Miller was employed 'about' a factory, and was therefore entitled to compensation.

This decision was appealed from, and the appeal was allowed, on the ground that there was no evidence upon which the County Court Judge could properly find that the employment was 'about' a factory within the meaning of the Act. Smith L.J. felt difficulty in holding that no County Court Judge was entitled to say that a distance of 110 yards from a factory was 'about' a factory, though, for his part, he said it was not. But as the rest of the Court thought that there was no evidence on which the County Court Judge could find as he did, he agreed that the appeal should be allowed. Collins L.J. said it was not possible to define exactly the meaning of such a word as 'about,' but he added that it was a geographical expression, involving the idea of a certain physical contiguity. 'One thing the word clearly does not embrace;' he said, 'it is not sufficient that the workman should be about the business of his master.' To come within the Act, a man must not only be employed about the business of his master, but about his master's business in physical contiguity to the factory or other undertaking. See also *Whitton* v. *Bell and Sime, Ltd.* (36 S.L.R. 754); *Kent* v. *Porter* (38 S.L.R. 482); *Barclay, Curle and Co., Ltd.*, v. *M'Kinnon* (38 S.L.R. 321); *Tench* v. *Fish and Son* (111 Law Times 42).

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Sec. 7. (1.)

In *Turnbull* v. *Lambton Collieries, Ltd.* (82 L.T.R. 589; 16 T.L.R. 369), a workman was in the employ of a colliery company, who owned a large number of collieries and also a private railway, about twelve miles in length, which connected the various collieries with the North Eastern Railway system. On the day of the accident he was driving a train containing coal to the coal depôt belonging to the colliery company, and when the train arrived at a point three-quarters of a mile from the pit's mouth, he met with an accident which caused his death. On a claim for compensation being made by his widow, the County Court Judge found in her favour.

An appeal to the Court of Appeal, however, was allowed, as in the words of Smith L.J., 'the accident clearly did not happen "on, in, or about" the mine, because it happened three-quarters of a mile away from the mine.' See p. 143, *post*. But see *Monaghan* v. *United Collieries, Ltd.* (38 S.L.R. 92) on p. 144.

From a consideration of the foregoing cases, it is useless to attempt to define the meaning of the word 'about.' It still remains a question of fact for the Arbitrator to determine in each particular case, after taking into consideration all the surrounding circumstances, whether the accident happened 'about' the undertaking or not. It is not altogether a question of yards. The Arbitrator can take into consideration the kind of factory and the size of it, the ground that it actually covers, and the surrounding ground which belongs to the owners of the factory. He can consider the way by which it is approached, whether by a private or a public road, whether through land which belongs to the owner of the factory, or through land belonging to other owners. When he has considered all these questions, and many others that may arise in any particular case, it is for him to say whether the accident occurred 'about' the factory or not, and his decision will not be disturbed if there was evidence before him to justify his finding.

ON OR IN OR ABOUT AN ENGINEERING WORK. — The question as to the meaning of the word 'about' again arose in *Chambers* v. *Whitehaven Harbour Commissioners* ([1899] 2 Q.B. 132; 80 L.T.R. 586; 15 T.L.R. 341). A harbour was

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being dredged by a steam dredger, the mud being discharged from the dredger into hoppers or barges which, when full, were taken by a tug out to sea and there emptied. A workman went on a hopper to help in discharging it, and, when about a mile and a half out at sea, was knocked overboard and drowned. The Court held that the words 'engineering work' as used in Sec. 7 (1) and as defined in Sec. 7 (2), point to locality, just as the words 'railway, factory, mine, quarry,' do, and that, in order to bring a particular case within the purview of the Act, the employment must be 'on, in, or about' the named locality at the time of the accident. Therefore, on the principle laid down in *Powell* v. *Brown* (*supra*) and *Lowth* v. *Ibbotson* (*supra*), the deceased could not be said to have been drowned 'on or in or about' the engineering work carried on by the dredger, as he was a mile and a half away at the time. But see *Berwickshire County Council* v. *Middlemiss* (37 S.L.R. 297).

Sec. 7. (1.)

This case did not decide that dredging operations constituted an 'engineering work.' The decision was simply on the question of proximity to the locality of the undertaking.

ON OR IN OR ABOUT MACHINERY USED FOR UNLOADING.—In *Woodham* v. *The Atlantic Transport Co.* ([1899] 1 Q.B. 15; 79 L.T.R. 395; 15 T.L.R. 51) a ship was being unloaded in a dock by means of a crane situated on the quay. The crane had been hired by the shipowners from the dock company. Woodham, along with other men, was employed on the ship, engaged in placing cases in a basket attached to the chain of the crane, for the purpose of their being hoisted out of the ship and placed on the quay. Whilst so engaged, he was killed by the explosion of a case of percussion caps, which he had immediately before placed in the basket. The question before the Court was whether the deceased could be said to have been employed 'on or in or about' the crane, that is, on or in or about 'machinery or plant used in the process of loading or unloading to or from a dock, wharf, quay or warehouse' (see p. 119). For the employers it was contended, that he was not working on, in, or about the crane, as he was not employed in working the crane, and the accident was in no way connected with the crane. The Court, however, held

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Sec. 7. (1.) that the deceased was employed 'about' the crane, and that his widow was entitled to the compensation which had been awarded by the County Court Judge.

BUILDINGS TO WHICH THE ACT APPLIES.—Though employment on a building is the last kind of employment mentioned in this section, it is thought best to consider it now, and to leave the other classes until Sec. 7 (2) is reached, wherein they are further defined. Each of the other classes of employment will be considered under the definitions given in Sec. 7 (2).

To bring a building in the course of construction or repair within the Act, it must be shown that it exceeds thirty feet in height, and that scaffolding is being used for the purpose of constructing or repairing it.

In the case of a building being demolished, it is immaterial whether scaffolding is being used in the process or not, but the building itself must exceed thirty feet in height.

Until the decision of the Court of Appeal in *Mellor* v. *Tomkinson and Co.* ([1899] 1 Q.B. 374; 79 L.T.R. 715; 15 T.L.R. 142) there was some doubt as to the meaning of the words at the end of this sub-section. The question was whether the words 'or on which machinery driven by steam, water, or other mechanical power' referred to 'any building' or to 'any building which exceeds thirty feet in height'; that is to say, whether a building on which machinery was used had to exceed thirty feet in height or not. In this case it was held that the Act applies to employment on or in or about a building on which machinery driven by steam, water, or other mechanical power is being used, although the building does not exceed thirty feet in height. 'I think,' said Smith L.J., 'that the true construction of the sub-section is that the words "which exceeds thirty feet in height" are to be read only with the words "and is either being constructed or repaired by means of a scaffolding, or being demolished," and that the antecedent to the subsequent words "or on which machinery driven by steam, water, or other mechanical power is being used, etc.," is simply the word "building."' See also *Murnin* v. *Calderwood* (36 S.L.R. 648).

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There are therefore three classes of buildings to which the Act applies :— Sec. 7. (1.)

(1) Buildings exceeding thirty feet in height in the course of construction, or repair by means of a scaffolding.

(2) Buildings exceeding thirty feet in height being demolished whether scaffolding is being used or not.

(3) Buildings of any height on which machinery driven by steam, water, or other mechanical power is being used for the purpose of their construction, repair, or demolition.

(1) **BUILDINGS IN THE COURSE OF CONSTRUCTION OR REPAIR BY MEANS OF A SCAFFOLDING.**

HEIGHT OF BUILDING.—Though the building must exceed thirty feet in height, there is no direction in the Act as to how the measurement is to be taken ; whether from the level of the ground or from the foundations, whether to the top of the upright walls or to the top of the roof. No rule has been definitely laid down by the Court of Appeal, but in *Hoddinott* v. *Newton, Chambers and Co.* ([1899] 1 Q.B. 1018 ; 80 L.T.R. 558 ; 15 T.L.R. 299), they approved of a measurement taken from the mean level of the ground to the topmost part of the building which was then in existence ; though, in the case referred to, the question as to whether the height of the building below ground could be taken into consideration was left open. The building in that instance was twenty-eight feet in height from the ground to the parapet, and thirty-six feet if measured from the ground to the ridge of the roof. The Court held that it exceeded thirty feet in height, Smith L.J. observing that it was not necessary to say whether the height of the building below the ground-level could be taken into consideration, for in that case the building was admittedly more than thirty feet high from the ground up to the ridge of the roof, to which point, he thought, the measurement should be taken.

In the Scotch case of *Halstead* v. *Alexander Thomson and Sons* (38 S.L.R. 473), it was held that whether a building at the time of an accident exceeds thirty feet in height is a question of fact for the decision of the Arbitrator. But the decision went further than that, as the Court of Session agreed

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Sec. 7: (1.) that the Arbitrator was right in including in his measurement a portion of the building which was underground. In this case a wash-house was being erected, and on the roof of it was a cupola over eight feet in height. Underneath the floor of the wash-house, but above the foundation of the building, there was a basement in which were culverts containing pipes. These culverts were formed with brick walls and concrete floors, so that men might walk along them to look after the pipes, and they occupied two-fifths of the area of the ground underneath the wash-house floor. In considering the height of the building, it was held that the Arbitrator was right in including the depth of the culvert and the height of the cupola.

In *M'Grath* v. *Neill and Sons* (110 Law Times 431) the Judge of the Manchester County Court gave a carefully considered judgment as to how a building should be measured. In that case some warehouses were being constructed, and at the time of the accident the highest point reached was the second floor joist. The four following measurements were agreed upon:—(1) From footing to second floor joist, 33 ft. 2½ in.; (2) from top of footing to second floor joist, 31 ft. 2½ in.; (3) from basement floor to second floor joist, 29 ft. 10 in.; (4) from level of street to second floor joist, 23 ft. 5¾ in.

His Honour considered No. 1 the right measurement, and said:—'I should find the highest point a building has attained and the lowest brick of actual building, and the difference between the two is the height of the building. . . . I should not take into consideration of height of a building a foundation of concrete or rubble, but I should always measure from the lowest brick, and pay no heed to street levels, basements, or trenches in which the building was placed. *As soon as building work attains a height of thirty feet, then, in my view, the building is thirty feet high.*'

This case is under appeal, and if the method of measuring adopted by his Honour is confirmed by the Court of Appeal, there will then be a simple and practical rule for measurement, which will be binding on all Arbitrators. But it may be pointed out that even this measurement is likely to lead to

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results which could hardly have been in the contemplation of the Legislature when they introduced the thirty feet test. There are often buildings where, in order to get a foundation, the workmen are required to go a great deal further down into the ground than the building, when erected, will be above the level of the ground, and where, after the foundations are laid, the excavations about them are filled up with soil. In such cases it would appear difficult to hold that the height of the building is to be measured from the lowest point at which any building work on the first foundation stones has been placed, as this point, owing to unforeseen circumstances, is very much lower down than was contemplated, and much deeper than under ordinary circumstances would have been necessary for that particular building.

Sec. 7. (1.)

Internal communication between a building over thirty feet high and an adjoining building less than that height, coupled with the fact that the same business is carried on in both buildings, is not evidence to justify a finding that the lower building is a part of the higher (*Rixsom* v. *Pritchard and Renwick*, [1900] 1 Q.B. 800; 82 L.T.R. 186; 16 T.L.R. 250). For the facts of this case, see note under 'Buildings being demolished' on p. 109, *post*. But see *M'Gregor* v. *Wright and Sons* (111 Law Times 183).

The building must in fact exceed thirty feet in height at the time of the accident. It is not enough that it is in the course of construction and will, when finished, exceed thirty feet in height (*Billings* v. *Holloway*, [1899] 1 Q.B. 70; 79 L.T.R. 396; 15 T.L.R. 53).

CONSTRUCTION OR REPAIR.—This class of building must be in the course of construction or repair. It therefore becomes important to know what is meant by 'construction or repair,' and a recent decision of the House of Lords helps us to do this. In *Hoddinott* v. *Newton, Chambers and Co.* ([1899] 1 Q.B. 1018; 80 L.T.R. 558; 15 T.L.R. 299) a building had been erected as stables for an omnibus company, and, six months after its completion and after its use as stables, the company employed a firm of contractors to strengthen it by introducing iron stays, which were fastened to the girders and the upright iron columns supporting the building. The Court

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Sec. 7. (1.) of Appeal held that the building was not being 'constructed or repaired,' on the ground that the introduction of iron stays to strengthen a completed building was not a work of construction or repair, but was an alteration or addition to a building already constructed and not in need of repair properly so called.

The House of Lords reversed this decision ([1901] A.C. 49; 84 L.T.R. 1; 17 T.L.R. 134) on the ground that to limit the word 'construction' to buildings not yet completed would be to substitute the word 'erection' for 'construction' in this sub-section. Lord Macnaghten said:—'I do not think "construction" can be limited to the original construction. That would in effect be substituting "erection" for "construction." Nor do I think that "construction" and "repair" can be limited to the construction and repair of a building "as a whole" (a view taken by Collins L.J. in the Court of Appeal). . . . It seems to me that *whenever new material is put into a building so that it becomes an integral part of the structure, you have something in the nature of construction*; and that a building which is being so treated is being constructed within the meaning of the Act—you are putting together the old materials and the new. Now, if this be "construction" I do not think it can matter in the least whether the work is taken in hand immediately after the erection of the building, or not commenced until months or even years later. Nor do I think it is of importance to inquire why the work has been undertaken. . . . What has to be looked at is the thing done, not the motive for doing it or the relative dates of the erection of the building and its subsequent alteration. *Construction, repair, demolition—these three operations cover, I think, every varying phase in the life of a building from its beginning to its end.*' Lord Morris said:—'*When you realise what the entity called the building is, all operations on it must be either constructing, or repairing, or demolishing. . . . There is no room for any third operation of so-called alteration, as distinct from constructing or repairing.*'

PAINTING AND WHITEWASHING.—Before the decision of the House of Lords in *Hoddinott* v. *Newton, Chambers and Co.* (*supra*) the Court of Appeal had held that painting the out-

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side of a house was not 'repair' within the meaning of the Act (*Wood* v. *Walsh and Sons*, [1899] 1 Q.B. 1009; 80 L.T.R. 345; 15 T.L.R. 279). Since that decision, however, owing to certain expressions (*e.g.* see extract from Lord Morris' judgment quoted above) used by some of the Lords in their judgments, the Court of Appeal, in *Dredge* v. *Conway, Jones and Co.* ([1901] 2 K.B. 42; 84 L.T.R. 345; 17 T.L.R. 355), felt itself bound to reverse its former ruling, and to hold painting and whitewashing to be 'repair' under this sub-section. In this case a workman was employed in whitewashing a ceiling in a building exceeding thirty feet in height, when he fell from a scaffolding on which he was standing and was killed. It was held that 'painting, as one of the operations to which a building is exposed, comes under the head of repair, and, if painting does so, then equally whitewashing' (Per Smith M.R.); but the Master of the Rolls said he should not be disposed to consider mere ornamental work 'repairing' within the meaning of the Act, whilst Romer L.J. 'wished to guard himself from being supposed to decide that every unimportant piece of work that is done on a building is within the statute because some small trestle or insignificant support is used in doing the work.' Sec. 7. (1.)

It would appear, therefore, that painting, etc., to come within the Act, must be painting which is necessary for the preservation of the structure of the building and not painting which is done merely for ornamentation, but it must be admitted that it will often be difficult to determine what painting, etc., amounts to 'repair,' or what is mere ornamentation, and not of sufficient importance to come within the Act.

What is 'construction' or 'repair' is a question of law to be decided by the Arbitrator upon the facts found by him (*Hoddinott* v. *Newton, Chambers and Co.* (*supra*); *Hobbs and Samuels* v. *Bradley*, 37 S.L.R. 532).

The injured workman himself need not be engaged in work of construction or repair, provided he is employed by undertakers 'on, in, or about a building which exceeds thirty feet in height, and is being constructed by means of a scaffolding.'

In *Mason* v. *A. R. Dean, Ltd.* ([1900] 1 Q.B. 770; 82 L.T.R. 139; 16 T.L.R. 212) a workman was employed in paint-

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Sec. 7. (1.) ing the ceiling of an incomplete building exceeding thirty feet in height and then in the course of construction by means of a scaffolding. Whilst so engaged, one of the planks on which he was standing gave way, and he fell to the floor and was killed. The contention of the employers, when a claim for compensation was made by his widow, was, that painting a ceiling was not an employment within the Act, and the County Court Judge, relying on *Wood* v. *Walsh and Sons* (*supra*), set aside an award made in favour of the widow by an Arbitrator.

The Court of Appeal, however, restored the Arbitrator's award. 'Here,' said Collins L.J., 'the deceased man was employed in painting, and it was this fact which misled the County Court Judge; the particular work which the man is doing has nothing to do with his employment by the undertakers within the meaning of the Act. He must be in the employment of the undertakers on, in, or about a building over thirty feet high which is being constructed or repaired by means of a scaffolding or is being demolished; if that is the case, it does not matter in what particular department of the work the man is employed, for he is employed by undertakers who themselves are within the definition in the Act.'

In *Maude* v. *Brook* ([1900] 1 Q.B. 575; 82 L.T.R. 39; 16 T.L.R. 164) a workman was employed on the inside plastering work of a villa, when he met with an accident which caused his death. The deceased was engaged in plastering the walls and ceilings, which was done in the ordinary way by putting the plaster on laths and smoothing it down with a float. The County Court Judge, on a claim for compensation being made by the widow, was of opinion that the plastering of the walls and ceiling of an unfinished house was part of its construction, and the Court of Appeal held that he was justified in his finding. *Maude* v. *Brook* is also an authority as to what constitutes 'scaffolding' (see p. 102, *post*).

SCAFFOLDING.—There is no definition of scaffolding given in the Act, with the result that many questions have arisen as to what the word embraces. The Court of Appeal have refused to give a definition of it, and have held that whether

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a structure amounts to a scaffolding within the meaning of the Act or not, is a question of fact for the Arbitrator to determine, and that no appeal against his finding can be successful, excepting on the ground that there was no evidence to support it (see *Wood* v. *Walsh and Sons* [1899] 1 Q.B. 1009; 80 L.T.R. 345; 15 T.L.R. 279; *Hoddinott* v. *Newton, Chambers and Co.* [1899] 1 Q.B. 1018; 80 L.T.R. 558; 15 T.L.R. 299); *Maude* v. *Brook* [1900] 1 Q.B. 575; 82 L.T.R. 39; 16 T.L.R. 164; and *Ferguson* v. *Green* [1901] 1 K.B. 25; 83 L.T.R. 461; 17 T.L.R. 41). Sec. 7. (1.)

In *Hoddinott* v. *Newton, Chambers and Co.* ([1899] 1 Q.B. 1018; 80 L.T.R. 558; 15 T.L.R. 299) a workman was employed by a firm of ironmasters to put in strengthening stays connecting the iron girders with the upright iron columns of a building, and while so employed he met with an accident. At the time of the accident, he was inside the building standing upon a structure put up for use in the day time, and removed every evening. No poles were used in its construction, but the workmen stood upon scaffold boards resting on ledges, which were themselves lashed to the iron columns. In order to make the structure stronger, trestles were placed underneath the middle of the scaffold boards to support them; the board upon which the injured workman stood was about eight feet from the ground. The County Court Judge held that this structure was a scaffolding; and the Court of Appeal, though it was not necessary for their judgment, as they allowed the appeal on another ground (see p. 98, *ante*), refused to disturb this finding, as there was some evidence to support it. 'I cannot say,' said Smith L.J., 'that there was no evidence that the structure used was a scaffolding, and the County Court Judge found that it was one. The men certainly used scaffold boards in its construction; there were no poles, but the ledges were lashed to the upright iron columns of the building, and to strengthen the structure trestles were placed underneath it in the middle. If this was not itself a scaffolding, it cannot be made one by the fact that it was used for the purpose of a scaffolding; but, as I said before, I cannot hold that there was no evidence to support the finding that it was a scaffolding.'

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Sec. 7. (1.) Collins L.J., however, thought that the scaffolding must have some connection with the height of the building, as the height of the building and the use of scaffolding must have some relation to the actual risk provided against.

In *Maude* v. *Brook* ([1900] 1 Q.B. 575; 82 L.T.R. 39; 16 T.L.R. 164), a claim for compensation was made by the widow of a plasterer who was killed whilst engaged upon the inside plastering work of a new house, which had been roofed in at the time of the accident, and from which the external scaffolding had been removed. The deceased was employed along with other men, and, in order to enable the plasterers to reach the ceilings and upper parts of the walls in the various rooms, boards were placed upon trestles about four feet high, and upon these boards the men stood, when necessary, for the purposes of their work. At the time of the accident, an arrangement of this kind was in fact being used by the deceased's fellow-workmen in some of the rooms, but not by the deceased himself. When he was last seen, the deceased was standing on the floor of the top landing, plastering the wall. Shortly afterwards he was found lying at the bottom of the staircase fatally injured, having fallen down the well of the staircase, which was unprotected by banisters. The County Court Judge held that this arrangement of trestles and boards constituted a scaffolding, and the Court of Appeal (Collins L.J. dissenting) said that there was evidence to justify him in so finding.

Collins L.J., however, was opposed to this view, and said:—'Reading the section with due regard to the context, I cannot persuade myself that a board laid upon trestles inside a room is within the meaning of the word "scaffolding" as used in the section. No uninstructed person would, in my judgment, think of calling such a temporary erection a scaffolding at all; certainly he would not look upon it as a scaffolding by means of which a building upwards of thirty feet high could be constructed or repaired.'

These decisions were highly unsatisfactory. As long as it remained purely a question of fact whether a certain structure constituted 'scaffolding' or not, there was nothing to prevent Arbitrators from finding that exactly the same structures were

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scaffolding in one case and not in another. Some Arbitrators might be of opinion that planks laid on trestles were 'scaffolding,' and others that they were not, and if decisions on the point were to be given according to the particular views taken by different Arbitrators, one workman might obtain compensation which was refused to another under exactly the same circumstances. Such an anomaly did in fact arise. In *Ferguson* v. *Green* ([1901] 1 K.B. 25; 83 L.T.R. 461; 17 T.L.R. 41), the facts were not merely similar to those in *Maude* v. *Brook* (*supra*) but identical with them, except that the accident did not result in death. The application for compensation was heard before an Arbitrator appointed by a County Court Judge, and he found as a fact that the arrangement of trestles and boards used by the applicant was not a scaffolding, and therefore made an award in favour of the respondents. On the matter coming before the Judge, he was of opinion that the Arbitrator had misdirected himself, as the judgment in the Court of Appeal in *Maude* v. *Brook* (*supra*) showed that the arrangement was a scaffolding. He therefore made an award in favour of the applicant, from which the employer appealed.

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The Court of Appeal held that the question whether the structure was a scaffolding or not was a question of fact for the Arbitrator, and that his finding was not open to review. The appeal was therefore allowed. 'The Arbitrator,' said Collins L.J., 'was at large so far as the law is concerned, and was not bound to say that as a matter of law this structure was scaffolding, but was free to come to the conclusion, as a matter of fact, that it was not. Adopting loyally, as I do, the decisions of this Court, I do not see how he could so find in view of a precisely similar case in which the opposite conclusion was come to; but still it was a question for him, with which the County Court Judge could not deal on appeal.'

Such decisions naturally led to great confusion, and were seriously inconvenient to the thousands of workmen and others whose interests depend upon the provisions of the Act. Happily, however, the principle of these decisions can now be regarded as overruled, owing to the decision of the House of Lords in *Hoddinott* v. *Newton, Chambers and Co.* (*infra*).

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Sec. 7. (1.) **QUESTION OF SCAFFOLDING BEFORE THE HOUSE OF LORDS.**—The decisions of the Court of Appeal, that the question as to what constitutes a scaffolding is purely a question of fact, are no longer law. In *Hoddinott* v. *Newton, Chambers and Co.* ([1901] A.C. 49; 84 L.T.R. 1; 17 T.L.R. 134), the House of Lords decided unanimously that such questions as to what constitute a scaffolding are not solely questions of fact but mixed questions of fact and of law, upon which, after the facts have once been found, the Court of Appeal are bound to express an opinion, and in the judgment of Lord Brampton very clear directions are given to Arbitrators as to the kind of facts it is necessary to find before deciding in law that a certain structure is a scaffolding. 'I thoroughly agree,' says he on p. 68, 'that the Arbitrator or County Court Judge is the proper tribunal to find every fact which is necessary for the determination of the question whether the arrangement in the particular case before it is or is not "scaffolding" within the meaning of the Act. Such, for instance, as the mode in which the arrangement is put together, the component parts of it, the materials used for its construction, the use to which it is applied, the place and the size of the place in which it is used, the dimensions of it, etc.; and his finding upon such facts is, according to the general rule, final; *but whether, upon the facts, so found, the arrangement so constructed is a scaffolding sufficient to satisfy the requirements of Sec. 7 is, in my opinion, a question of law*, which in the first instance must be adjudged by him to enable him to determine the case before him, his judgment on the question of law being open to review by the Court of Appeal.'

WHAT IS MEANT BY SCAFFOLDING?—As there is no definition of scaffolding in the Act, and as the Court of Appeal have over and over again refused to give a definition of it, or even to direct Arbitrators what kind of structures would constitute a scaffolding and what would not, but have left the question for them to decide as a question of fact, much confusion has arisen, and many unnecessary appeals have been heard. Since the decision of the House of Lords, however, in *Hoddinott* v. *Newton, Chambers and Co.* ([1901] A.C. 49; 84 L.T.R. 1; 17 T.L.R. 134), it is possible to form some idea as

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to what kind of structure will constitute a scaffolding. In that case, it will be remembered that the man who was killed was standing on scaffolding boards, resting on ledgers lashed to the iron columns of a building and supported by trestles in the centre at a height of eight feet from the ground (see p. 101), and the House of Lords was unanimous in holding this structure to be a 'scaffolding' within the meaning of the Act. The word 'scaffolding' must therefore be widely interpreted, and must not be confined to that kind of scaffolding which is commonly used by builders, namely poles, boards and planks fastened together by ropes, but it will include any structure, whether usual or unusual, which can properly be called scaffolding, and which is suitable for the occasion, as there is nothing in the Act which requires the scaffolding to be of any particular description or dimensions, or to be in any particular place or of any particular height. For instance, if a builder had the control of two walls, one on each side of the site where a scaffold was needed, he might, if he could do so, utilise them by laying planks across from one to the other, and such structure would be a scaffolding without the use of either poles or trestles (per Lord Brampton at p. 69 of his judgment). Sec. 7. (1.)

The following extract from the judgment of Lord Brampton in *Hoddinott* v. *Newton, Chambers and Co.* (at p. 72), will show what a wide interpretation must be placed upon the word 'scaffolding':—'When I realise to myself that the necessity for such works of construction or repair may occur in all or any parts or part of a building, whether high up, near to the top, or low down even to the foundations, and that such defects will in course of time inevitably make their appearance in the now newest buildings, and that such works, reconstruction, or repair will, when the defects cannot be reached by a man standing on the ground, require the assistance of a scaffold, I feel driven to the conclusion that *the Act, with all its faults, in using the word "scaffolding" meant scaffolding suitable to the occasion*, and would not have intended to confine it to such a scaffold as was capable of being used for the construction or repair of the building as a whole, which in a large majority of cases would be so inconvenient and costly as to be absurd.'

The case of *Maude* v. *Brook* (see p. 102) was referred to in

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Sec. 7. (1.) most of the judgments, from which it appears that the House considered the arrangement there used constituted a 'scaffolding.' 'I cannot say,' said Lord Lindley, 'that boards on trestles, even inside a room, may not be a scaffolding.'

It would appear, however, that to constitute a scaffolding, there must be some kind of construction or arrangement, and that a ladder *per se* is not a scaffolding (*Wood* v. *Walsh and Sons* [1899] 1 Q.B. 1009; 80 L.T.R. 345; 15 T.L.R. 279; *M'Donald* v. *Hobbs and Samuel*, 37 S.L.R. 4).

HEIGHT OF SCAFFOLDING.—The scaffolding itself need not be thirty feet high, but to bring a building within the section there must be a scaffolding, and it must be used upon a building exceeding that height. Nor need it be a scaffolding adequate for the construction or repair of a building exceeding thirty feet in height 'as a whole,' a view taken by Collins L.J. in *Maude* v. *Brook* (*supra*). Commenting on this view, Lord Brampton, in *Hoddinott* v. *Newton, Chambers and Co.*, at p. 71, said:—'I cannot agree in this, for, were it so, it would be impossible to introduce into an ordinary room undergoing repair and requiring the use of a scaffold, one adapted for the construction or repair of the whole building. *I think the meaning of the Legislature was that from time to time, when work of construction or repair required the aid of a scaffold, any scaffold suitable for that particular purpose would be within the meaning of sec. 7.*'

ACCIDENT NEED NOT HAPPEN IN CONNECTION WITH SCAFFOLDING.—Though to bring a case within this section there must be a building exceeding thirty feet in height which is being constructed by means of a scaffolding, the accident need not be in any way connected with or have reference to the scaffolding. As pointed out by Rigby L.J. in *Maude* v. *Brook* (*supra*), it is not necessary that the accident should happen by reason of the scaffolding—that is, it need not involve the falling of any one or any thing on or from the scaffolding. 'If we once get a house,' he said, 'being constructed by means of scaffolding, any accident happening to a workman employed by the undertakers on that building would be within the Act.'

Another instance of this is found in the case of *Mason* v.

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A. R. Dean, Ltd., ([1900] 1 Q.B. 770; 82 L.T.R. 139; 16 T.L.R. 212). A workman was killed whilst painting the ceiling of a theatre over thirty feet high, which was in an incomplete state and was being erected by means of a scaffolding. It was contended on behalf of the employers that the applicant was not engaged in an employment, namely painting (see *Wood* v. *Walsh and Sons*, p. 98), to which the Act applied. The Court did not accept this contention, Collins L.J. observing that it was immaterial what particular kind of work the workman was doing at the time of the accident, provided he was employed by undertakers on a building within the Act. (See also judgment of Lord Macnaghten in *Hoddinott* v. *Newton, Chambers and Co.*, *supra.*)

Sec. 7. (1.)

These decisions, as pointed out by Collins L.J. in his judgment in the former case, will have strange results. They cover the case of a workman employed on a building, who meets with an accident which has no relation to the scaffolding in any sense. It must follow that, if a house is completed except for the inside plastering, and a single plasterer is engaged at his work on a board supported by two trestles, another man who stumbles on going upstairs and is injured, can obtain compensation under the Act. As long as the scaffolding is up, all workmen employed on, in, or about the building have the benefit of the Act, whether they are employed in connection with the scaffolding or not; but whenever the scaffolding is taken down, they will lose the benefit of the Act, though they may be engaged in exactly the same work as previously. Thus a workman who is employed entirely on the inside work of a house in the course of erection by means of a scaffolding, passes through two periods of time during which he can have no claim under the Act, and one during which he can, though his actual work is of the same description throughout. Until the building reaches thirty feet in height and the scaffolding is erected, he does not come within the Act; as soon as this happens he will have a right to compensation in case of injury; but directly the scaffolding is taken down, he is again outside the Act. This is strange indeed, as scaffolding of the description of

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Sec. 7. (1.) that in *Maude* v. *Brook* (*supra*) cannot possibly render the employment of a workman, who is not brought into connection with it, more dangerous than it would be without such scaffolding.

REMOVAL OF SCAFFOLDING.—A building constructed by means of a scaffolding is 'being constructed' within the meaning of this sub-section until the scaffolding has been taken down. Such is the effect of the decision of the Court of Appeal in *Frid* v. *Fenton* (82 L.T.R. 193; 16 T.L.R. 267). The applicant was in the employment of the respondent, who was building a chimney-shaft at some cement works near Rochester. The shaft exceeded thirty feet in height and was built of bricks upon a cement foundation. It stood near the edge of a small cliff about twenty feet high, and it was necessary, for the purpose of doing the work, that building materials should be raised from the lower level to the top of the cliff. Accordingly, a staging about twenty feet in height was erected on the lower level. It was constructed with poles, ledgers, and putlogs in the manner in which scaffolding is usually constructed. At the time of the accident the brickwork of the shaft had been entirely finished. The scaffolding inside it, by means of which it had been erected, had been taken away, and the chimney was in actual use as a chimney. The applicant was standing on the staging which had been erected on the lower level, and, while engaged in removing gear which had been used in the construction of the shaft, he was accidentally injured. It was held that the applicant was employed on a building which was 'being constructed' by means of a scaffolding. 'In my opinion,' said Smith L.J., 'the job had not been finished because the scaffolding had not been taken away.'

WHEN SCAFFOLDING NOT ACTUALLY IN USE.—In *Halstead* v. *Alexander Thomson and Sons* (38 S.L.R. 473) it was proved that in the construction of a building certain trestles and planks were erected and used from time to time for the purpose of forming a scaffolding, but that at the time of the accident they were not erected or in use. It was nevertheless held that the building was at the time of the accident being constructed by means of a scaffolding. The reason for this

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decision was, in the words of Lord Moncreiff, that 'the scaffolding was regularly used from time to time by all the tradesmen engaged in the work during the construction of the building, both prior and subsequently to the accident.' Sec. 7. (1).

RESULT OF DECISIONS ON 'SCAFFOLDING.'—From the decisions arrived at in the foregoing cases, the following conclusions can be drawn :—

(1) Whether any particular structure is a scaffolding or not is a question of law to be found when the facts have been ascertained (*Hoddinott* v. *Newton, Chambers and Co.*, p. 104).

(2) It is immaterial whether the scaffolding is outside or inside the building (*Hoddinott* v. *Newton, Chambers and Co.*, p. 101 ; *Maude* v. *Brook*, p. 102).

(3) The scaffolding may consist of loose planks resting on walls or buttresses without the use of either poles or trestles (*Hoddinott* v. *Newton, Chambers and Co.*, p. 105).

(4) A building is being 'constructed by means of a scaffolding' until all the scaffolding has been removed, even though the building itself is complete (*Frid* v. *Fenton*, p. 108).

(5) The scaffolding itself need not be any particular height, nor need it have any relation to the height of the building. It is the height of the building that establishes liability (*Hoddinott* v. *Newton, Chambers and Co.*, p. 106 ; *Maude* v. *Brook*, p. 106).

(6) The accident need not happen with reference to the scaffolding (*Maude* v. *Brook*, p. 106).

(7) The scaffolding need not be actually in use at the time of the accident (*Halstead* v. *Thomson*, p. 108).

(2) **BUILDINGS BEING DEMOLISHED.**—To bring these within the Act, they must exceed thirty feet in height at the time of the accident, or machinery driven by steam, water, or other mechanical power must be used for the purpose of their demolition. That the height of the building at the time of the accident must exceed thirty feet, appears from *Rixsom* v.

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Sec. 7. (1.) *Pritchard and Renwick* ([1900] 1 Q.B. 800; 82 L.T.R. 186; 16 T.L.R. 250). In High Street at Dartford, next to the Bull Inn, there stood two buildings less than thirty feet in height, which were formerly shops. They had been acquired by the landlord of the inn, and a communication had been made between the inn and the nearer building, which was called the beerhouse. The landlord determined to demolish the two low buildings, for the purpose of extending the main building of the inn. This work was undertaken by the respondents, and the applicant in the course of his employment was injured whilst working at the houses that were being demolished. The sole question in the case was, whether the applicant was employed on, in, or about a building which exceeded thirty feet in height and was being demolished within the meaning of this sub-section, and the Court of Appeal held that he was not. Smith L.J. said it was clear to him that the applicant was engaged in pulling down the beerhouse, which was less than thirty feet in height. The only building which was over thirty feet in height was the Bull Inn, and that was not being demolished at all. But see *M'Gregor* v. *Wright and Sons* (111 Law Times 183).

(3) **BUILDINGS ON WHICH MACHINERY IS USED.**—There is no limit as to the height of these buildings, but the machinery must be used for the purpose of their construction, repair, or demolition (*Mellor* v. *Tomkinson and Co.* [1899] 1 Q.B. 374; 79 L.T.R. 715; 15 T.L.R. 142; page 94, *ante*).

UNDERTAKERS IN THE CASE OF A BUILDING.—'Undertakers,' in the case of a building, means 'the persons undertaking the construction, repair, or demolition' (Sec. 7 (2)). In *Cass* v. *Butler* ([1900] 1 Q.B. 777; 82 L.T.R. 182; 16 T.L.R. 227) it was held that a sub-contractor with the undertaker was not himself an undertaker within the meaning of this definition. The facts of this case will be found set out on page 64, and it was followed in the case of *Cooper* v. *Davenport—Winstanley, third party* (16 T.L.R. 266). This was an appeal from an award made by a County Court Judge. The applicant was the widow of a deceased workman who had been in the employment of Winstanley. The

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respondent Davenport was a builder, and he had entered into a contract to build a workhouse infirmary. Davenport sublet the plumbing part of the work to Winstanley, and the deceased man, who was employed by Winstanley, met with his death through an accident arising out of and in the course of his employment. A claim was thereupon made against Davenport, who claimed to be indemnified by Winstanley under Sec. 4, and the County Court Judge made an award against Davenport, and ordered Winstanley to indemnify him. Winstanley was successful in his appeal, Smith L.J. observing that a sub-contractor was not an undertaker, and was therefore not liable to pay compensation under the Act. He was therefore not liable to indemnify another person liable under Sec. 4. See p. 66.

Sec. 7. (1.)

In *Percival* v. *Garner* ([1900] 2 Q.B. 406; 16 T.L.R. 396) it was decided that a person who supplied the labour for another person, who was undertaking the construction of a building, was not himself an undertaker.

In *M'Gregor* v. *Dansken* (36 S.L.R. 393) it was held that the owner of a building who contracts with another to repair the building for him, and who does not himself engage in the work, is not the 'undertaker.' But if a builder builds a house for himself and engages his own men in the work, he is the 'undertaker,' even though he has let out contracts for portions of the work (*Stalker* v. *Wallace*, 37 S.L.R. 898).

The result of these decisions is, that the 'undertaker' in the case of a building is either the owner who undertakes the work himself, or the contractor who contracts with him to do it. This subject is discussed in the notes under Sec. 4, at p. 61.

INDEPENDENT CONTRACTORS MAY BE UNDERTAKERS.—Though a sub-contractor is not an undertaker, there may be more than one undertaker engaged on the same building. Thus in *Mason* v. *A. R. Dean, Ltd.* ([1900] 1 Q.B. 770; 82 L.T.R. 139; 16 T.L.R. 212), where two independent contractors had each contracted separately with the building owner to do a separate part of the work of construction, each was held to be an undertaker. The facts in this case will be found on p. 75.

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Sec. 7. (2.)

(2.) In this Act—

'Railway' means the railway of any railway company to which the Regulation of Railways Act, 1873,[1] applies, and includes a light railway made under the Light Railways Act, 1896,[2] and 'railway' and 'railway company' have the same meaning as in the said Acts of 1873 and 1896.

RAILWAY.—By Section 3 of the Regulation of Railways Act, 1873,[1] 'railway' includes 'every station, siding, wharf, or dock of or belonging to such railway and used for the purposes of public traffic.'

REFRESHMENT-ROOM AT RAILWAY STATION.—Is employment in a refreshment-room at a railway station employment 'on, in, or about a railway' within the meaning of Sec. 7? This point came before the Court of Appeal in *Milner* v. *Great Northern Railway Co.* ([1900] 1 Q.B. 795; 82 L.T.R. 187; 16 T.L.R. 249). The applicant, a barmaid, employed by the Great Northern Railway Co. in their refreshment-room at Peterborough Station, was injured while at work, by reason of a framed advertisement falling upon her from off the wall of the room. The refreshment-room was directly managed by the railway company, and the only entrance to it was from the station platform. It was held that the employment was not 'on, in, or about a railway,' and that she was therefore not entitled to compensation under the Act. This decision was arrived at on the ground that a refreshment-room at a railway station is not 'used for the purposes of public traffic,' and is therefore not included in the term 'railway' as defined above. 'Though a building might,' said Romer L.J., 'be fairly called part of a station, and though the station be undoubtedly used for the purposes of public traffic, it does not follow that every part or room of that building is of necessity to be considered as a part of the station used for the purposes of public traffic

[1] 36 and 37 Vict. c. 48. [2] 59 and 60 Vict. c. 48.

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within the definition of the word "railway" in Sec. 3 of the Regulation of Railways Act, 1873.[1] . . . I think in the present case that the refreshment-room can be and ought to be considered as something in itself and apart from the railway station; at any rate, it is something apart from the station in this sense, that it certainly is not part of a station used for the purposes of public traffic.' Sec. 7. (2.)

STABLES AND SMITHY AT RAILWAY STATION. — In *Caledonian Railway Co.* v. *Breslin* (37 S.L.R. 873) a railway company kept a number of horses at a stable situated within their premises at one of their stations, and had a smithy there at which these horses were shod. They were used partly in lorries, partly in drawing trucks along the line. A man in the employment of the company, whose duty it was to shoe the horses, was accidentally injured whilst so engaged. The question was whether he was employed 'on, in, or about a railway,' in view of the definition of railway given above, and it was contended on behalf of the company that the stables and smithy were not part of the station, inasmuch as they were not 'used for public traffic,' because the public had not access to them. The Court of Session, however, did not take this view, and held that he was employed 'about a railway,' on the ground that he was fitting a part of the railway plant for the purpose of conducting the traffic. As to the stables and smithy not being used for public traffic, Lord Adam said the proper test was, not whether the public had access to them, but whether they were used for the purpose of facilitating the public traffic.

In *Devine* v. *Caledonian Railway Co.* (36 S.L.R. 877) it was held that an accident to a carter whilst he was waiting to load at a goods station happened 'on, in, or about a railway.'

PRIVATE RAILWAYS. — A private railway belonging to colliery owners, which is used for the conveyance to its place of delivery of coal got from their various collieries, but which is not used for the purposes of public traffic, is not a 'railway' within the meaning of this sub-section (*Turnbull* v. *Lambton Collieries, Ltd.*, 82 L.T.R. 589; 16 T.L.R. 369).

In *Brodie* v. *North British Railway Co.* (38 S.L.R. 38) a

[1] 36 and 37 Vict. c. 48.

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Sec. 7. (2.) servant of a railway company was injured on a private line which belonged to a trading company, at a point three-quarters of a mile from the junction with the system of the railway company, the line being used by the railway company solely for the carriage of goods to and from the works. It was held that this siding was not a 'railway' within the meaning of this sub-section for three reasons :—

(1) It was not the railway of any railway company.

(2) It was not a railway to which the Regulation of Railways Act applied, because it was not constructed or carried on under the powers of any Act of Parliament.

(3) It was not used for public traffic, but only for traffic to the trading company.

It was also held that the accident happened too far from the respondent's railway to be said to have happened 'on, in, or about it.'

RAILWAY COMPANY.—By Sec. 3 of the Regulation of Railways Act, 1873,[1] 'railway company' is defined as including 'any person or body of persons, corporate or unincorporate, being the owner or lessee of or working any railway in the United Kingdom constructed or carried on under the powers of any Act of Parliament.'

LIGHT RAILWAY.—The Light Railways Act, 1896,[2] does not give any definition of a 'light railway,' but it must be taken to mean one constructed under the provisions of that Act, viz. by obtaining an order from the Commissioners appointed by the Act, and getting the order confirmed by the Board of Trade.

UNDERTAKERS IN THE CASE OF A RAILWAY. — 'Undertakers in the case of a railway means the railway company' (Sec. 7 (2)), and consequently there will be included in that term the person or body of persons referred to in the definition of 'railway company' given above.

As to what work is merely 'ancillary or incidental' to a railway company, see p. 76.

[1] 36 and 37 Vict. c. 48. [2] 59 and 60 Vict. c. 48.

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'Factory' has the same meaning as in the Factory and Workshop Acts, 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery, or plant, to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895,[1] and every laundry worked by steam, water, or other mechanical power. Sec. 7. (2.)

This is one of the most confusing definitions in the Act, owing to the number of definitions of 'factories' and 'workshops' in the Acts mentioned, and to the inclusion in the word 'factory' of places such as docks, where no real manufacturing is done, but which are to be deemed factories because some provision of one or other of the Factory Acts is applied to them.

THREE CLASSES OF FACTORIES WITHIN THE DEFINITION.—There are three distinct kinds of factories included in the definition given in this sub-section, and we think it convenient to consider each separately :—

(1) Factories within the meaning of the Factory and Workshop Acts, 1878 to 1891. See below.

(2) Docks, wharves, quays, warehouses, machinery and plant, which are to be deemed 'factories' because of the application to them of some provision of one or other of the Factory Acts. See p. 118.

(3) Laundries worked by steam, water, or other mechanical power. See p. 138.

I.—FACTORIES WITHIN THE MEANING OF THE FACTORY AND WOKKSHOP ACTS, 1878 TO 1891.

In the Factory and Workshop Act, 1878,[2] a distinction is drawn between textile and non-textile factories, but no such distinction is drawn in the Workmen's Compensation Act,

[1] 58 and 59 Vict. c. 37. [2] 41 and 42 Vict. c. 16.

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Sec. 7. (2.) 1897. Therefore both classes will be included in the term 'factory.'

The material sections of the Factory Acts are set out in full in Appendix J, on p. 335.

The following places are always 'factories' within the meaning of the Factory and Workshop Acts, 1878 to 1891, whether mechanical power is used or not :—

Print works, for printing on cotton, linen, woollen, worsted or silken yarn, or upon any woven or felted fabric, not being paper; bleaching and dyeing works; earthenware and china works, excluding brick and non-ornamental tile works; lucifer-match works; percussion-cap works; cartridge works; paper-staining works; fustian-cutting works; blast furnaces; copper mills; iron mills; iron, copper, and brass foundries (except where process is carried on by not more than five persons and as subsidiary to the repair or completion of some other work); metal and indiarubber works; paper mills; glass works; tobacco factories; letterpress-printing works; book-binding works; flax scutch mills. (Factory and Workshop Act, 1878,[1] Sec. 93, and Schedule IV. Part 1.)

The following places are only 'factories' when steam, water, or other mechanical power is used :—

(i) 'Any premises wherein or within the close or curtilage of which steam, water, or other mechanical power is used to move or work any machinery employed in preparing, manufacturing, or finishing, or in any process incident to the manufacture of cotton, wool, hair, silk, flax, hemp, jute, tow, china-grass, cocoa-nut fibre, or other like material, either separately or mixed together, or mixed with any other material or any fabric made thereof.' (Factory and Workshop Act, 1878,[1] Sec. 93.)

(ii) Hat works; rope works; bakehouses; lace warehouses; shipbuilding yards; quarries; pit banks. (Factory and Workshop Act, 1878,[1] Sec. 93 (2), and Schedule IV. Part 2.)

[1] 41 and 42 Vict. c. 16.

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(iii) Any premises wherein or within the close or curtilage or precincts of which any manual labour is exercised by way of trade, or for purposes of gain in or incidental to the following purposes, or any of them, that is to say:—

(*a*) In or incidental to the making of any article or of part of any article; or

(*b*) In or incidental to the altering, repairing, ornamenting, or finishing of any article; or

(*c*) In or incidental to the adapting for sale of any article. (Factory and Workshop Act, 1878,[1] Sec. 93 (3).)

It is, however, possible for premises to be situate in a factory and yet not be a factory, owing to the following provision:—'Where a place situate within the close, curtilage or precincts forming a factory or workshop is solely used for some purpose other than the manufacturing process or handicraft carried on in the factory or workshop, such place shall not be deemed to form part of that factory or workshop for the purposes of this Act.' (Factory and Workshop Act, 1878,[1] Sec. 93.). See this section fully set out in Appendix J.

In *Weir* v. *Petrie* (37 S.L.R. 795) a stone-dressing yard, in which there was an engine-house, where tools were sharpened on a grindstone driven by a gas engine, was held to be a 'factory,' though no other mechanical power was used on the premises, on the ground that the gas engine was used in the aid of the manufacturing process carried on there.

In *Henderson* v. *Corporation of Glasgow* (37 S.L.R. 857) it was held that works, where steam was employed to dispose of the town refuse, some of which, after being subjected to certain processes, was sold, constituted a 'factory,' though no actual profit was in fact made, on the ground that it was a place where manual labour was exercised for purposes of gain, in the adapting for sale of the refuse. It is of no consequence, if there is a trade being carried on, whether it results in gain or not.

In *Nash* v. *Hollinshead* ([1901] 1 K.B. 700; 84 L.T.R. 483; 17 T.L.R. 352), it was held that a steam mill used by a farmer to grind meal for consumption as food by the stock

[1] 41 and 42 Vict. c. 16.

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Sec. 7. (2.) on his farm, did not constitute the premises a 'factory,' on the ground that, though the operation of grinding meal might come within the words 'in or incidental to the making of any article,' it was not carried on 'for purposes of gain.'

In *Law* v. *Graham and Bradley* (84 L.T.R. 599; 17 T.L.R. 474) certain premises were used solely for the purpose of washing bottles and bottling beer. Before the bottles were filled, which was done by manual labour, they were washed inside by a rotary brush, driven by a small gas engine. Nothing was done to the beer itself, and no process of any kind, manufacturing or otherwise, was done on the premises. It was held that the premises were not a factory within Sec. 93 of the Factory and Workshop Act, 1878,[1] on the ground that the washing of bottles by mechanical means was not a process used 'in aid of' the bottling of the beer.

II.—DOCKS, WHARVES, QUAYS, WAREHOUSES, MACHINERY AND PLANT WHICH ARE TO BE DEEMED FACTORIES.

In addition to the premises above mentioned, the Act includes under the word 'factory,' 'any dock, wharf, quay, warehouse, machinery, or plant, to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895.'[2]

TO WHICH ANY PROVISION OF THE FACTORY ACTS IS APPLIED.—In *Hall* v. *Snowden, Hubbard and Co.* ([1899] 2 Q.B. 136; 80 L.T.R. 554; 15 T.L.R. 326) it was argued that the words 'to which any provision of the Factory Acts is applied' qualified only the words 'machinery or plant' which immediately preceded them, and that the word 'factory' included every dock, wharf, quay, and warehouse. The Court, however, rejected this argument, and held that the words 'to which any provision of the Factory Acts is applied,' apply to and limit the whole budget of words preceding them, and that in order to get a wharf, which *per se* is not a factory, within the term factory, it must be shown that some provision of one or other of the Factory Acts is applicable to it. For comments on this decision, see p. 121, *post*.

[1] 41 and 42 Vict. c. 16. [2] 58 and 59 Vict. c. 37.

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FACTORY AND WORKSHOP ACT, 1895.—Sec. 23 of the Factory and Workshop Act, 1895,[1] applies certain provisions of the Factory Acts mentioned previously in the section to take effect as if— **Sec. 7. (2.)**

'(*a*) Every dock, wharf, quay and warehouse, and, so far as relates to the process of loading or unloading therefrom or thereto, all machinery and plant used in that process; and

'(*b*) Any premises on which machinery worked by steam, water, or other mechanical power, is temporarily used for the purpose of the construction of a building or any structural work in connection with a building,

were included in the word factory, and the purpose for which the machinery is used were a manufacturing process, and as if the person who by himself, his agents, or workmen temporarily uses any such machinery for the before-mentioned purpose were the occupier of the said premises; and for the purpose of the enforcement of those sections the person having the actual use or occupation of a dock, wharf, quay or warehouse, or of any premises within the same or forming part thereof, and the person so using such machinery, shall be deemed to be the occupier of a factory.'

PROVISIONS OF THE FACTORY ACTS WHICH ARE SO APPLIED.—The provisions of the various Factory Acts which are so applied to docks, wharves, etc., are referred to in the first part of Sec. 23 of the Factory and Workshop Act, 1895.[1] They are as follows:—

(1) Sec. 82 of the Factory Act, 1878.[2]

(2) The provisions of the Factory Acts with respect to accidents.

(3) Sec. 68 of the Factory Act, 1878,[2] with respect to the powers of inspectors.

(4) Sec. 8-12 of the Factory Act, 1891,[3] with respect to special rules for dangerous employment.

(5) Sec. 4 of the Factory Act, 1895,[1] with respect to the power to make orders as to dangerous machines.

These sections will be found set out in full in Appendix J, at p. 340.

[1] 58 and 59 Vict. c. 37. [2] 41 and 42 Vict. c. 16. [3] 54 and 55 Vict. c. 39.

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Sec. 7. (2.) **SHORT EFFECT OF SEC. 23 OF FACTORY AND WORKSHOP ACT, 1895.**—The short effect, then, of Sec. 23 of the above Act is to make the foregoing provisions of the Factory Acts apply, as if the following two classes of premises were included in the word factory :—

(i) Every dock, wharf, quay and warehouse, and so far as relates to the process of loading or unloading therefrom or thereto, all machinery and plant used in that process.

(ii) Any premises on which machinery worked by steam, water, or other mechanical power, is temporarily used for the purpose of the construction of a building or any structural work in connection with a building.

IS EVERY DOCK, ETC., NECESSARILY A FACTORY?—The provisions of the Factory Acts enumerated above are applied to 'every dock, wharf, quay and warehouse.' And as 'factory' is defined in this Act as including any dock, etc., to which any provision of the Factory Act is applied, it would appear that all docks, wharves, quays and warehouses are factories within the meaning of this Act. But in *Hall* v. *Snowden, Hubbard and Co.* ([1899] 2 Q.B. 136; 80 L.T.R. 554; 15 T.L.R. 326) this was held not to be so. In this case the respondents were the occupiers of a wharf on the banks of a canal used for the purpose of loading street sweepings into barges. There was no machinery in the wharf, and it was not shown that any person was employed in the wharf. A carter employed by the respondents was killed just outside the wharf by an accident arising out of and in the course of his employment. It was contended for the applicant, that the wharf was a factory within the meaning of this sub-section, because some provisions of the Factory Acts were applied to it by the Factory and Workshop Act, 1895.[1] The provisions applied, it was maintained, were those contained in Sec. 18 of the Act of 1895 with respect to giving notice of accidents, and those contained in Sec. 68 of the Act of 1878 with respect to the power of Inspectors to enter a factory. The Court held, however, that neither section had any application: Sec. 18 only applying where an accident occurs 'in' a factory, whereas in this case no accident had occurred on the wharf, and Sec. 68

[1] 58 and 59 Vict. c. 37.

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of the Act of 1878 having no application, as there was no evidence that any person was employed there. 'Under Sec. 18 of the Factory and Workshop Act, 1895,' said Smith L.J., 'it is only when the accident occurs "in" a factory that notice has to be given; the section, therefore, cannot be made applicable in the present case because no accident occurred on the wharf.' On the same point Collins L.J. said:—'The provisions of that section (viz. Sec. 18) can only apply to a wharf when an accident has occurred on the wharf, which may then become a factory for the purposes of that section.' Sec. 7. (2.)

The effect of this decison is, that a wharf is not a factory unless some provision of the Factory Acts has in fact been applied to it; that the provision as to giving notice of accidents does not apply unless an accident has actually happened on the wharf. This certainly appears to be a strange interpretation of the words 'to which any provision of the Factory Acts *is* applied'; it in effect reads them as though they were 'to which any provision of the Factory Acts *has been in fact applied.*' If there is a wharf, and an accident which may happen thereon has to be reported, it would have been thought that that wharf would be a factory, because the only reason that the accident has to be reported is that Sec. 23 of the Factory and Workshop Act, 1895,[1] applies the provision as to giving notice of accidents to the wharf. Hence it was argued in this case that every dock, wharf, quay or warehouse, to which there is attached the obligation of giving notice of accidents, is a factory, whether any accident has in fact occurred thereon or not. Indeed, it would appear that the point for the Court to consider was not whether an accident had occurred on the wharf, but whether, if an accident did at any time occur on the wharf, it would have to be reported. If an accident would have to be reported, it would have to be reported because Sec. 18 of the Act of 1895 had been made applicable to the wharf, and if Sec. 18 was applicable to the wharf, it would appear that the wharf would be a factory within the meaning of this sub-section. But as the decision in *Hall* v. *Snowden, Hubbard and Co.* (*supra*) has settled the interpretation that is to be put upon this sub-

[1] 58 and 59 Vict. c. 37.

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Sec. 7. (2.) section, it would appear that a workman who has met with an accident on, in, or about any dock, wharf, quay, or warehouse must be prepared to bring evidence to show that some provision of the Factory Acts has in fact been put in force in that dock, wharf, quay or warehouse.

It may be mentioned that this decision was doubted in the Scotch case of *Bruce* v. *Henry and Co.* (37 S.L.R. 511) and was expressly disapproved in *Strain* v. *Sloan and Co.* (38 S.L.R. 475), when an accident, which occurred in the street immediately outside the wharf, was held to have occurred 'about' a factory, on the ground that if the accident had happened on the wharf, the provision in the Factory Acts as to giving notice of it would have applied. See also *Raine* v. *Jobson and Co.* ([1901] A.C. 404; 17 T.L.R. 627), where it was admitted in argument that by the combined effect of the Compensation Act, 1897, and the Factory Act, 1895,[1] *every dock is a factory within the Act of* 1897.

POSITION OF SHIPOWNERS.—The position of shipowners under the definition of this sub-section was considered in *Woodham* v. *Atlantic Transport Co.* ([1899] 1 Q.B. 15; 79 L.T.R. 395; 15 T.L.R. 51), where it was held that a shipowner, who uses the machinery or plant of a dock company, for the purpose of loading or unloading to or from a dock, becomes the occupier of a factory. A ship was being unloaded in a dock by means of a crane situated on the quay, the crane having been hired by the shipowners from the dock company. Woodham, along with other men, was employed on the ship, engaged in placing cases in a basket attached to the chain of the crane, for the purpose of their being hoisted out of the ship on to the quay. Whilst so engaged, he was killed by the explosion of a case of percussion caps which he had immediately before placed in the basket. On behalf of the shipowners, two points were raised before the Court:—(1) Whether the word 'dock' included a ship loading or unloading in a dock. It was contended that a man employed on a ship in a dock is employed on, in, or about a ship, and not on, in, or about a dock. (2) Whether the deceased was employed on, in, or about 'machinery or plant used in the process of loading or unloading from or to a dock.' It was

[1] 58 and 59 Vict. 37.

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contended that, as the deceased was not employed in working the crane, and as the accident did not occur through the working of the crane, he could not recover compensation. The Court expressed no opinion on the first point, and on the second point it held that the accident arose out of and in the course of the deceased's employment on or about machinery used in the process of unloading to a quay, such machinery being, by virtue of Sec. 23 of the Factory and Workshop Act, 1895,[1] constituted a factory. 'It is necessary,' said Smith L.J., 'to read together Sec. 1 (1), Sec. 7 (1) and (2) of the Workmen's Compensation Act, and Sec. 23 (1) of the Factory and Workshop Act, 1895.[1] Reading those enactments together, the provisions of the Act, so far as material, run thus: If personal injury is caused to a workman by an accident arising out of and in the course of employment on, in, or about, among other things, machinery or plant used in the process of loading or unloading from or to a dock, wharf, quay, or warehouse, the Act shall apply.' See also *Lawson* v. *Atlantic Transport Co.* (16 T.L.R. 181; 82 L.T.R. 77).

Sec. 7. (2.)

It has also been held that the process of loading or unloading from or to a quay with machinery or plant on the ship herself and not on the quay, renders the person undertaking that process liable under the Act; that is to say, it makes no difference whether the machinery used is on the ship or on the quay, provided that the land part of the dock is used in the operation. In *Stuart* v. *Nixon and Bruce* ([1901] A.C. 79; 84 L.T.R. 65; 17 T.L.R. 156) the winch, derrick and fall by means of which the ship was being loaded were all on board the ship, but they were nevertheless 'machinery and plant used in the process of loading,' and therefore, by virtue of section 23 of the Factory and Workshop Act, 1895,[1] they became a 'factory,' and the persons using them were the 'undertakers.' 'By a very singular application,' said the Lord Chancellor, 'of the fashion of legislation by reference, the Legislature has made certain machinery for loading or unloading to or from a wharf—not machinery of a factory, but it has made it by statute a "factory" itself, and the person using the machinery is to be the person in control of the factory so as to establish the legal liability.'

[1] 58 and 59 Vict. c. 37.

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Sec. 7. (2.)

A different conclusion has, however, been arrived at in Scotland by the Court of Session, though all the cases bearing on the point were decided before *Stuart* v. *Nixon and Bruce* (*supra*) reached the House of Lords. In *Aberdeen Steam Trawling and Fishing Co., Ltd.* v. *Peters* (36 S.L.R. 573) it was held that machinery on board a ship, though used in a dock for loading or unloading from or to a quay was not a factory, and that, therefore, employment about such machinery was not an employment to which the Act applies. In giving judgment, the Lord President said:—'Section 23 of the Factory Act, 1895,[1] does not apply any of the provisions it enumerates to loading or unloading machinery which forms any part of the ship's apparatus.' This decision was followed in *Healy* v. *Macgregor and Ferguson* (37 S.L.R. 454) and *Laing* v. *Young and Leslie* (38 S.L.R. 29), in which latter case Lord Moncreiff, in the course of his judgment, said:—'Machinery, in order to bring it within the scope of the Workmen's Compensation Act, must be shown to be machinery attached to or upon the dock or quay.'

The result of these conflicting decisions is curious. As there is no appeal to the House of Lords from the Court of Session (see p. 235), the law under this Act, which applies to both England and Scotland, appears to be different in the two countries: a workman who is injured whilst employed in loading or unloading a ship from or to a quay by means of a steam winch on the ship is within the Act in England but outside it in Scotland. See note on p. 235.

As to who are the 'undertakers' in the case of machinery and plant used in the process of loading and unloading, see p. 141.

As to what constitutes such machinery and plant, see p. 134.

EMPLOYMENT ON SHIP IN A DOCK.—In *Flowers* v. *Chambers* ([1899] 2 Q.B. 142; 80 L.T.R. 834; 15 T.L.R. 352) it was held that a man employed on board a ship in a dock was not employed 'on, in, or about a dock,' as the word dock could not be taken to include a ship in a dock. This decision (which was followed in *Medd* v. *MacIver* (15 T.L.R. 364)

[1] 58 and 59 Vict. c. 37.

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and *Durrie* v. *Warren* (15 T.L.R. 365); see also *Abernethy and Co.* v. *Low* (37 S.L.R. 506)) appears to be too narrow an interpretation of the word dock, and though it has not been expressly overruled, it was disapproved of by the House of Lords in *Raine* v. *Jobson and Co.* ([1901] A.C. 404; 17 T.L.R. 627). In that case, the respondents, who were ship repairers, owned no dock of their own, and in order to examine and repair the bottom of a ship, they hired a dry dock. A workman in their employ was at work on the ship, when he slipped off a gangway connecting the ship with the side of the dock, fell into the dock, and was killed. The County Court Judge, on the authority of *Flowers* v. *Chambers* (*supra*), decided that the deceased was not employed on, in, or about a dock, but only about the ship, and his decision was upheld by the Court of Appeal.

Sec. 7. (2.)

The House of Lords, however, unanimously reversed the decision, the Lord Chancellor observing that the dock was admittedly a factory, that the accident happened in the dock, and that the fact that there was a ship in the dock was quite irrelevant, while Lord Macnaghten said:—'If you translate the account of the accident from ordinary language into the phraseology of the statute, it seems to come under the very words of the enactment. The "dock" was a factory, because it was a "dock to which some provision of the Factory Acts is applied by the Factory and Workshop Act, 1895."[1] Messrs. Jobson were "undertakers," because they had at the time "the actual use and occupation of the dock." The accident happened to a workman "in" the dock, and it was an accident "arising out of and in the course of" his employment.'

This decision appears to upset the narrow view taken by the Court of Appeal, that if a man is on a ship and the ship is in a dock, the man is not in a dock for the purposes of the Act. In *Raine* v. *Jobson and Co.* the dock was a dry dock, and the respondents had hired the exclusive use of it. But a dock is none the less a dock because there is water in it. Take the case of a ship lying in dock preparatory to being loaded or unloaded. The owners of the ship have 'the actual use and occupation' of a portion of the dock, because the water of the

[1] 58 and 59 Vict. c. 37.

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Sec. 7. (2.) dock is just as much a portion of the dock as the land that surrounds it, and this makes them 'occupiers' of the dock, just as in *Merrill* v. *Wilson, Sons and Co.* (see p. 132), the fact of a ship being moored alongside a quay made the shipowners the 'occupiers' of a portion of the quay; and, being 'occupiers,' they become 'undertakers' within the meaning of the Act. If, therefore, an accident happens to one of their workmen employed on the ship in the dock, it is submitted that, in view of the decision in *Raine* v. *Jobson and Co.* (*supra*) the accident will happen 'on, in, or about' the dock, and that it will be immaterial that it happened on a ship in the dock, the shipowners being the 'undertakers' of that portion of the dock where it happened.

If this view is correct it will be necessary for students of the Act to consider the present value of decisions such as, *Flowers* v. *Chambers* (*supra*); *Hennesey* v. *M'Cabe* ([1900] 1 Q.B. 491; 81 L.T.R. 575; 16 T.L.R. 77; *Medd* v. *MacIver* (15 T.L.R. 364); and *Durrie* v. *Warren* (15 T.L.R. 365). To consider and criticise each of them in the light of *Raine* v. *Jobson and Co.* (*supra*) would be going beyond the scope of this volume, but these cases must now always be read in conjunction with the last named.

LOADING AND UNLOADING SHIPS IN A DOCK.—It has already been seen in *Woodham* v. *Atlantic Transport Co.* (*supra*), that owing to the provisions of Sec. 23 of the Factory and Workshop Act, 1895,[1] persons engaged in loading and unloading to or from docks, wharves, quays and warehouses by means of machinery and plant are included in the Workmen's Compensation Act. What constitutes loading and unloading to or from a dock? Does it include loading from one ship to another in a dock? This question came before the Court of Appeal in *Hennesey* v. *M'Cabe* ([1900) 1 Q.B. 491; 81 L.T.R. 575; 16 T.L.R. 77). A ship in a dock was moored alongside the quay, but the cargo was being loaded from lighters or barges on the other side of the ship, by means of a fall or hoist worked by a steam-winch on the deck of the steamer, and no shore machinery was used during the operation. The applicant was working on the ship receiving

[1] 58 and 59 Vict. c. 37.

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casks of pitch, and whilst doing so his finger was jammed and badly hurt. The question was, whether the steam-winch on board the ship, which was used for taking in cargo from a lighter lying alongside the ship, was a 'factory' within the meaning of the Act. It was contended that it was, as it was machinery used in the process of loading a ship from a dock. On the other hand, it was argued that the machinery was not used in the process of loading from a dock, but only in the process of loading from a lighter, and that consequently no provision of the Factory Acts was applied to it by Sec. 23 of the Factory and Workshop Act, 1895,[1] so as to constitute it a 'factory.' This latter contention was accepted by the Court of Appeal, and it was held that loading from the lighter into the ship was not loading from the dock, and that the steam-winch was not a 'factory,' as it was not machinery used in the process of loading from a dock within the meaning of Sec. 23 of the Factory and Workshop Act, 1895.[1] 'What is the steam-winch used for?' said Smith L.J. 'Not for unloading to or from a dock, wharf, quay, or warehouse, but for nothing else than loading cargo into a ship from a lighter lying on the outside of the ship. It would be straining the language of the statute beyond all bounds if we were to hold that loading from a lighter into a ship was loading from a dock, etc. *Loading from one ship into another is not, in my judgment, employment within the Act of* 1897.'

Sec. 7. (2.)

But as to whether such an accident could be said to occur 'on, in, or about a dock' of which the shipowners were 'undertakers,' see *Raine* v. *Jobson and Co.* and notes thereon (p. 125).

In the Scotch case of *Laing* v. *Young and Leslie* (38 S.L.R. 29) a vessel which was being unloaded at a quay, had the services of an engine in a lighter, which was brought alongside the vessel on the outer side from the quay, for the purpose of lifting cargo from the hold of the vessel to the deck. The cargo was then put into bags by dock workmen and conveyed by them to the shore without the assistance of any machinery. It was held (Lord Young dissenting), that the lighter's engine was not machinery or plant used in the process of unloading to the quay.

[1] 58 and 59 Vict. c. 37.

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Sec. 7. (2.)

But as to whether an accident occurring under these circumstances could be said to happen 'on, in, or about a dock' of which the shipowners were 'undertakers,' see *Raine* v. *Jobson and Co.* and notes thereon (p. 125).

WHAT IS MEANT BY LOADING.—The loading of a vessel includes putting on the hatchways and securing them by beams. In *Stuart* v. *Nixon and Bruce* ([1901] A.C. 79; 84 L.T.R. 65; 17 T.L.R. 156) a workman was employed in loading a ship from a quay by means of machinery. The cargo had all been stowed in the hold, and the workman was 'finishing off' by stringing iron beams across the hatchway. Whilst doing so he was killed. It was held by the House of Lords (Lord Lindley dissenting), that this was part of the operation of loading, and that therefore the man was at the time of the accident employed 'on, in, or about machinery and plant used in the process of loading from a quay,' that is to say, 'on, in, or about a factory.'

WHAT CONSTITUTES A DOCK?—In *Hennesey* v. *M'Cabe* (*supra*) it was argued that loading from a lighter into a ship in a dock was loading from a dock. It was not suggested that the lighter itself was a dock, but that it was only part of the plant used in loading from a dock; that it was merely a receptacle for the goods, from which they were loaded. If cargo was brought down to a quay in a cart and loaded from the cart into the ship, it would none the less be loaded from the quay; the cart would not be the quay, but the loading from the cart would be a loading from the quay. In the same way, loading goods which had been brought into the dock on a lighter would be loading from the dock. This argument would no doubt have been accepted if it had been thought that the water part alone of a dock formed a dock. But Collins L.J., in the course of his judgment said that the word 'dock' ought to be read in its ordinary sense, as meaning both land and water. 'I think,' he said, 'that the word "dock" is used in its ordinary sense—that is, a place which embraces the land bounding the water space as well as the water itself, and that therefore the Legislature, when talking of loading and unloading to or from a dock, was not contemplating loading from a barge into a ship, but rather had in its contemplation

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a process which makes use of the land bounding the water space for the purpose of loading or unloading.' But see *Raine* v. *Jobson and Co.*, at p. 125. Sec. 7. (2.)

REPAIRING SHIP IN A DOCK.—The fact that repairs are being done to a ship in a dock does not make the dock a 'ship-building yard' within the meaning of the Factory and Workshop Act, 1878,[1] Schedule IV. Part II. (24), and therefore a 'factory' within the meaning of this section of the Workmen's Compensation Act (*Spencer* v. *Livett, Frank and Son* [1900] 1 Q.B. 498; 82 L.T.R. 75; 16 T.L.R. 179). In this case a steamship, having discharged her cargo, had been taken into an inner dock at Southampton to be painted. Whilst she was being painted and repaired, an injury occurred to one of the workmen employed on her. It was endeavoured to show that the dock itself was a 'factory' because it was a 'ship-building yard' within the meaning of the Factory and Workshop Act, 1878.[1] Schedule IV. Part II. of the Act includes:—'Ship-building yards, that is to say any premises in which any ships, boats, or vessels used in navigation are made, finished, or repaired.' The Court did not accept this argument, and in giving judgment Romer L.J. said:—'I think that the Legislature in the definition of a "ship-building yard" given by the Act of 1878 must have contemplated premises where something like a business of making, finishing, or repairing ships, boats, or vessels used in navigation is carried on, and not the case of a dock or other premises wherein repairs are only occasionally done to ships.' See also *Abernethy and Co.* v. *Low* (37 S.L.R. 506); *Jackson* v. *A. Rodger and Co.* (37 S.L.R. 390).

But if the dock itself were a factory by reason of Sec. 23 of the Factory and Workshop Act, 1895[2] (see p. 119), it is submitted that those who undertook the painting of the ship would be 'occupiers' of the dock, and hence 'undertakers' within the meaning of the Act. See *Raine* v. *Jobson and Co.*, and notes thereon, at p. 125.

As to who are the 'undertakers' in the case of a dock, see p. 139.

[1] 41 and 42 Vict. c. 16, Sec. 93.
[2] 58 and 59 Vict. c. 37.

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Sec. 7. (2.) **WHAT IS A WHARF?**—The question as to what constitutes a wharf was before the Court of Appeal in *Haddock* v. *Humphrey* ([1900] 1 Q.B. 609; 82 L.T.R. 72; 16 T.L.R. 143). The respondents were a firm of carters, who had been employed by a builder to fetch for him a particular log of timber, which was lying in a yard adjacent to the Canada Dock at Bootle, the yard being in the occupation of a firm of Parker and Co. The deceased, who was in the employment of the respondents, had been sent by them with a cart to fetch away the log, which was one of the lower logs in a pile of timber in the yard. While the upper logs were being moved out of the way by a travelling crane one of them slipped, and, falling against the deceased, caused fatal injuries. It was contended on the part of the applicant that the place where the accident happened was a wharf within the meaning of the Workmen's Compensation Act, and that the respondents were liable to pay compensation, while the respondents contended that it was merely a private timber-yard, and that they were exempt from liability.

The place in question was distant about 150 yards from the water of the dock. Alongside the water was a large space, called the timber quay, which stretched inland from the water about 150 yards; and at the extreme end of this space, running parallel with the water, was a roadway which was used by the public when the dock premises were open. On the further side of the roadway was a fence, with offices built at intervals and projecting in front of the fence; behind the fence and offices was a row of yards, the entrance to each of which was by a gate at the side of the office. The yards, together with the quay space, were all enclosed by a wall and gates. The yards and offices attached to them belonged to the dock board, and were leased by them to various parties, the particular yard where the accident happened being leased to Parker and Co., and used by them as a timber-yard for the storage of timber. On these facts the County Court Judge held that the *locus in quo* was not a wharf within the meaning of this sub-section and Sec. 23 of the Factory and Workshop Act, 1895[1] (see p. 119), and made his award in favour of the defendant. The Court of Appeal (Romer L.J. dissenting)

[1] 58 and 59 Vict. c. 37.

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agreed with this decision, and held that the word 'wharf,' as used in Sec. 23 of the Factory and Workshop Act, 1895,[1] and this sub-section of the Workmen's Compensation Act, must be construed in its ordinary and popular signification of a place contiguous to water over which goods pass in the process of loading and unloading; that the yard where the accident happened was not a wharf within the meaning of those sections, and that the employment of the deceased was therefore not one to which the Workmen's Compensation Act applied. Sec. 7. (2.)

All the Judges agreed that the space of 150 yards between the water's edge and the roadway was a wharf or a quay, but the majority were of the opinion that the land in question did not answer to the ordinary conception of a wharf, the primary idea in connection with which was not that of storing goods, but of use as a factor in their loading and unloading. The fact that the land was occupied by an individual tenant, the dock board having renounced all rights over it, except such as they had by virtue of being lessors, impressed Collins L.J., who stated that the yard had, on that account, ceased to be a wharf in the popular sense of the word, even if it were sufficiently contiguous to the water to be capable of being a wharf at all. 'It is, no doubt,' he said, 'contiguous to an undoubted wharf (viz. the space of 150 yards), but it is specially set apart and leased to a particular firm; it is not a place over which goods pass in transit, but one which is chiefly intended and used for the purpose of storage.'

From the judgments given in this case, it appears that little distinction was drawn between the word 'wharf' and the word 'quay.' The space of 150 yards referred to, it would appear, constituted a 'quay' rather than a 'wharf,' but Smith L.J. spoke of it as 'a wharf or quay,' thus appearing to treat the words as synonymous. Yet surely there is a difference between them, or why should both words be inserted in the Act? As both words are used, the intention of the Legislature must have been to refer to two distinct places, and not to one place which can be described as a 'quay or wharf,' and the distinction appears to be that a quay is a place for discharging cargo, and a wharf a place for storing it.

[1] 58 and 59 Vict. c. 37.

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Sec. 7. (2.)] **ON, IN, OR ABOUT A WHARF.**—In *Strain* v. *William Sloan and Co.* (38 S.L.R. 475), it was held that an accident, which occurred in a street immediately outside a wharf, happened 'on, in, or about a wharf.' But see *Hall* v. *Snowden, Hubbard and Co.*, at p. 120.

QUAY.—Shipowners who moor their ships alongside a quay become 'undertakers' of the quay. This was decided in *Merrill* v. *Wilson, Sons and Co.* ([1901] 1 K.B. 35; 83 L.T.R. 490; 17 T.L.R. 49), where a ship carrying cattle and other cargo was moored alongside a quay in a dock belonging to a railway company, for the purpose of discharging her cargo. The shipowners acted as their own stevedores, and a workman in their employment was at the time of the accident engaged in getting a gangway from the quay side to the ship, for the purpose of going on board and commencing the work of discharging the cattle. Whilst so engaged, he fell between the ship and the quay wall and was killed. The gangway was not used for the purpose of unloading the cargo, but merely as a means of access to and from the ship. The cattle were discharged into lighters on the other side of the ship (a work not within the Act, see *Hennesey* v. *M'Cabe*, at p. 126), and the work of discharging the other cargo on to the quay did not commence until two or three days after the accident.

It being admitted that the quay was a 'factory,' it was held by the Court of Appeal that the shipowners had the 'actual use' of a portion of the quay within the meaning of the Factory and Workshop Act, 1895, Sec. 23 (1),[1] and that they were therefore 'undertakers' in respect of a factory within the meaning of this section. See further, on p. 141.

WAREHOUSE.—What has been said on pp. 120 to 122 with reference to the application of provisions of the Factory Acts to docks, will apply equally to warehouses, because every warehouse to which any provisions of the Factory Acts is applied by the Factory and Workshop Act, 1895,[1] becomes a 'factory' within the meaning of this Act. There is no definition of 'warehouse,' and though a warehouse in Houndsditch and a carriage works at Newcastle-under-Lyme have been held not to be 'factories' within the meaning of the Act, the

[1] 58 and 59 Vict. c. 37.

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word 'warehouse' has not been judicially interpreted by the Court of Appeal. Sec. 7. (2.)

The view has been held that, as used in the definition of 'factory,' it must be confined to such warehouses as are connected with docks, wharves, and quays (*Smith* v. *Turner Ltd.*, 110 Law Times 205). But, owing to the wide interpretation put upon the words 'any other work' in the definition of engineering work (see p. 146), and to the decision of the Court of Appeal in *Haddock* v. *Humphrey* ([1900] 1 Q.B. 609; 82 L.T.R. 72; 16 T.L.R. 143), that the words 'dock, wharf, and quay' are to be interpreted in their ordinary popular sense, it is thought that this view is too narrow a one. A warehouse may be popularly described as a building for the storage of goods for the purposes of trade or commerce. If, then, any of the provisions in the Factory Acts enumerated in Sec. 23 of the Factory and Workshop Act, 1895[1] can be shown to be applicable to such a warehouse, that warehouse *ipso facto* becomes a 'factory.' And even when none of those provisions are applicable, if machinery or plant is used in the process of loading or unloading from or to such a warehouse, the machinery or plant itself becomes a factory by reason of the same section of the Factory and Workshop Act, 1895,[1] and consequently an accident occurring in close proximity to such machinery and plant will come within the Act.

ON, IN, OR ABOUT A WAREHOUSE.—In *Tench* v. *Fish & Son* (111 Law Times 42) a quantity of blocks of stone were stored in the goods yard of a railway company for the respondents, who were charged storage rent. The goods yard was enclosed but not covered, though inside it, but distant 115 yards from the place where the stone was stored, there was a covered goods shed. A workman in the service of the respondents was injured whilst engaged in loading the stone on to a dray by means of a crane. The County Court Judge held that the place where the stone was stored was not a warehouse, though the goods shed was, but as the stone was stored 115 yards away from the shed and had never had any connection with it, the accident could not be said to have happened 'in or about' the shed (see *Fenn* v. *Miller*, p. 91).

[1] 58 and 59 Vict. c. 37.

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Sec. 7. (2.) **MACHINERY AND PLANT.**—By Sec. 23 of the Factory and Workshop Act, 1895[1] (p. 119, *ante*) certain provisions of the Factory Acts are applied to all machinery and plant used in the process of loading or unloading to or from any dock, wharf, quay, or warehouse, and consequently such machinery and plant becomes a factory within the definition given in this sub-section. By the same section the person who by himself, his agents, or workmen temporarily uses such machinery and plant becomes the 'occupier' of a factory. It was seen in *Woodham* v. *Atlantic Transport Co.* (p. 122, *ante*) that a crane situated on the quay and used for unloading the ship to the quay was a factory, and that the shipping company using such machinery was, for the purposes of this Act, the occupier of the factory for the time being, and the same conclusion was arrived at, where the shipping company used its own machinery on the ship for the same purpose. (See *Stuart* v. *Nixon & Bruce*, p. 123, *ante*.)

WHAT CONSTITUTES SUCH MACHINERY AND PLANT.—In *Medd* v. *MacIver* (15 T.L.R. 364) the applicant was employed by the respondent in moving a ship from one part of a dock to another. The cargo had been taken into and discharged from the ship through two large iron doors in the ship's side. The applicant was ordered to close these doors before the ship was moved, and in doing so he received injuries to his hand. Owing to the decision in *Flowers* v. *Chambers* (p. 124, *ante*), the contention that the ship itself was a factory was no longer open to the applicant, the only question being whether the accident happened on, in, or about machinery or plant used for the purpose of loading or unloading to or from a dock. The Court of Appeal held that these gangway doors were not machinery or plant 'used in the process of loading or unloading' from or to a dock, and therefore did not constitute a 'factory' within the meaning of the Act.

In *Durrie* v. *Warren and Co.* (15 T.L.R. 365) a boy was employed by the respondents on a ship lying in a dock. After the loading had been completed, the boy was standing on a staging fastened outside the ship, engaged in assisting to screw up the iron doors of the ship, when he accidentally

[1] 58 and 59 Vict. c. 37.

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fell off the staging and was drowned. On a claim for compensation being made by his father, as in *Medd* v. *MacIver* (*supra*), the point that he was employed on, in, or about a dock, and therefore about a 'factory' was not open to him, but an effort was made to bring the staging within the meaning of 'machinery and plant.' The Court of Appeal, however, decided that the staging outside the ship was not 'machinery or plant used in the process of loading or unloading' from or to a dock, and was therefore not a 'factory' within the meaning of the Act. Sec. 7. (2.)

These two decisions throw some light upon the question as to what constitutes 'machinery and plant.' It will be noticed that in both cases the loading or unloading was completed before the accident occurred, and consequently, even if the gangway doors and the staging were plant, they could not be said to be 'used in the process of loading or unloading,' as such process was entirely completed and at an end. It would appear that 'machinery and plant,' to come within the meaning of the Act, must be the machinery and plant which is actually used to transfer the cargo from the ship to the quay or *vice versâ*, and does not include plant which is merely incidental to the process of loading and unloading.

As to who are the 'undertakers' in the case of 'machinery and plant,' see p. 141.

PREMISES ON WHICH MACHINERY IS TEMPORARILY USED IN BUILDING OPERATIONS.—It has been already seen that 'machinery and plant used in the process of loading and unloading to or from a dock, wharf, quay, or warehouse' comes within the definition of a factory (p. 122, *ante*).

We now come to another kind of machinery. 'Factory,' according to the definition in this sub-section, includes any machinery to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895.[1] Sec. 23 of that Act applies certain provisions of the Factory Acts to 'any premises on which machinery worked by steam, water, or other mechanical power is temporarily used for the purpose of the construction of a building, or any structural work in connection with a building' (p. 119, *ante*). Such premises consequently

[1] 58 and 59 Vict. c. 37.

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Sec. 7. (2.) become a 'factory,' and the section adds that 'the person so using any such machinery shall be deemed to be the occupier of a factory.'

In *M'Nicholas* v. *Dawson and Son* ([1899] 1 Q.B. 773; 80 L.T.R. 317; 15 T.L.R. 242) a workman was employed by a firm of builders who were engaged in erecting a post-office. About twenty yards from the post-office was a temporary shed, containing a steam-engine which was used to grind mortar for use in the building operations, the workman's duty being to look after the steam-engine. Whilst so employed he sustained personal injuries through an accident.

It was held that, as the engine was being temporarily used for the purpose of the construction of a building, the provision mentioned in Sec. 23 of the Factory and Workshop Act, 1895,[1] had effect as if the shed were a factory; so that a provision of the Act, namely Sec. 4 relating to power to make an order as to dangerous machines in a factory, applied to the engine, which therefore itself came within the definition of a factory under this section of the Workmen's Compensation Act.

By what Collins L.J. called a 'roundabout process' the engine itself became a factory as well as the shed in which it was situated. By Sec. 23 of the Factory and Workshop Act, 1895,[1] the engine-shed became a factory. By the Workmen's Compensation Act any machinery to which any provision of the Factory Acts is applied is to be deemed a factory. This engine was situated in what was made a factory by the Factory and Workshop Act, 1895,[1] and therefore it was made subject to the provisions mentioned in Sec. 23 of that Act, and came under the power given by Sec. 4 of the same Act to a Court of Summary Jurisdiction to make orders as to dangerous machinery in a factory. One of the provisions of the Factory Acts hence applied to this engine, which therefore became a factory within the meaning of the Workmen's Compensation Act. As Collins L.J. said:—'By the Factory and Workshop Act, 1895,[1] the premises are treated as a factory for the purpose of reaching the machinery, and the machinery so reached is by the Workmen's Compensation Act itself a factory—a factory within a factory!'

[1] 58 and 59 Vict. c. 37.

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MECHANICAL POWER. — What is meant by 'mechanical power'? 'Mechanical power' means something opposed to hand power, and does not include what is in the first place manual power, even when the force of that manual power is increased by a system of cog-wheels and pulleys. For instance, a hand-working winch used to lift planks from the ground to the higher portions of a building which is being constructed is not 'machinery driven by steam, water, or other mechanical power,' as these words appear to expressly exclude hand power. Sec. 7. (2.)

In *Wrigley* v. *Bagley and Wright and others* ([1901] 1 K.B. 780; 84 L.T.R. 415) a firm of engineers contracted with the owners of a cotton-spinning factory to put a new driving-wheel into a steam-engine, and, for the purpose of lifting the wheel, used a hand winch and pulleys. One of their workmen, whilst engaged in carrying out this operation, met with an acccident which resulted in his death, whereupon a claim for compensation was made against his employers on the ground that they were 'undertakers' in respect of an 'engineering work.' The pulleys, it was contended, were 'machinery' worked by the 'mechanical power' of the winch, though it was admitted that the winch itself was worked only by hand power.

The County Court Judge was of opinion that the driving power in this case was hand power and not mechanical, and the Court of Appeal upheld his decision, Collins L.J. observing that with regard to the contention that the work on which the deceased was engaged was an 'engineering work,' the point was met by the difficulty that the machinery used was not driven by 'steam, water, or other mechanical power.'

It would appear, therefore, that the words 'or other mechanical power' must be construed as meaning a power *ejusdem generis* with steam and water, which act automatically and continuously after having been put in motion in the first instance by manual labour, *e.g.* electricity and hydraulic power. (See *Bennett* v. *Aird*, 107 Law Times 550.)

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Sec. 7. (.)

III.—LAUNDRIES WORKED BY STEAM, WATER, OR OTHER MECHANICAL POWER.

The Act includes, under the definition of 'factory,' 'every laundry worked by steam, water, or other mechanical power.' If it had not been for these words, no laundry of any description would have come within the Act. They are not included in the Factory Acts 1878 to 1891; and the provisions of those Acts are, by the Factory and Workshop Act 1895,[1] applied only to any 'dock, wharf, quay, or warehouse, and so far as relates to the process of loading or unloading therefrom or thereto all machinery and plant used in that process,' and to premises on which machinery is used for building operations. As a laundry could not be said to come under any of these heads, in order to include it as a factory it was necessary to make special mention of it in the definition.

MECHANICAL POWER.—For what constitutes 'mechanical power,' see note on p. 137, *ante*.

UNDERTAKER IN THE CASE OF A FACTORY.—The 'undertaker' in the case of a factory is 'the occupier thereof within the meaning of the Factory and Workshop Acts, 1878 to 1895' (Sec. 7. (2)). But in none of those Acts, as far as a factory as generally understood is concerned, is there any definition of the word 'occupier.' It must therefore be taken to have its ordinary meaning, and to refer to the person who by himself or his workmen occupies and uses a factory for the purpose of carrying on his business.

Where a workman is injured by accident in a factory which is not occupied by his employer, the employer is not liable, even though the workman was on his employer's business at the time of the accident, that is to say, to come within the Act, the accident must happen on, in, or about the undertaker's own factory.

For instance, in *Francis* v. *Turner Brothers* ([1900] 1 Q.B. 478; 81 L.T.R. 770; 16 T.L.R. 105) the respondents, who were occupiers of a factory, sent some of their men to remove an engine, which they had purchased, from another factory, half a mile away. Whilst so engaged in the other factory, one of the men was injured, and it was held that his employers

[1] 50 and 51 Vict. c. 58.

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were not liable because they were not the 'occupiers' of that factory, and hence were not 'undertakers' within the meaning of the Act. Sec. 7. (2.)

In *Wrigley* v. *Bagley and Wright and Whittaker and Sons* ([1901] 1 K.B. 780; 84 L.T.R. 415) a firm of engineers contracted with the owners of a cotton-spinning factory to put a new driving-wheel into the steam-engine belonging to the factory. Whilst engaged in fixing the new wheel, a workman employed by the engineers met with an accident which caused his death. It was held that the deceased man's employers were not liable, because they were not 'occupiers' of the factory where the accident occurred.

In *Malcolm* v. *M'Millan* (37 S.L.R. 383) a workman in the employment of the occupier of an iron-foundry was sent in the course of his employment to repair some pipes in a soap-work, and while engaged in this work was killed. It was held that his employer was not liable, as he was not the 'occupier' of the soap-work.

In *Purves* v. *Sterne and Co.* (37 S.L.R. 696) a firm of engineers were trying machinery which they had erected in another's factory, and whilst doing so, one of their workmen was killed. It was held that his employers were not the 'occupiers' of the factory in question. See also *Barclay, Curle and Co., Ltd.* v. *M'Kinnon* (38 S.L.R. 321).

The result of these decisions is, that sec. 7 (1) applies only to employment in, on, or about the employer's own factory, and hence an employer is not liable to workmen whom he has sent to fit up machinery in his customer's premises. In fact, when a workman leaves his employer's premises to work for his employer somewhere else, the employer ceases to be an 'undertaker,' and is not liable in compensation.

UNDERTAKER IN THE CASE OF A DOCK, WHARF, QUAY, OR WAREHOUSE.—Here again the 'undertaker' is the 'occupier' thereof within the meaning of the Factory and Workshop Acts, 1878 to 1895' (sec. 7 (2)), and the 'occupier' is defined by Sec. 23 of the Factory and Workshop Act, 1895,[1] to be 'the person having the actual use or occupation thereof, or of any

[1] 58 and 59 Vict. c. 37.

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Sec. 7. (2.) premises within the same or forming part thereof' (p. 119, *ante*).

In *Raine* v. *Jobson and Co.* ([1901] A.C. 404; 17 T.L.R. 627) the respondents, who were ship repairers, owned no dock of their own; and in order to examine and repair the bottom of a ship, they hired a dry dock. A workman in their employ was at work on the ship, when he slipped off a gangway, fell into the dock, and was killed. The House of Lords unanimously held that the dock was a factory, and that the respondents were 'undertakers,' because they had at the time the 'actual use and occupation' of the dock. See also *Jackson* v. *Rodger and Co.* (36 S.L.R. 851.)

In *Abernethy and Co.* v. *Low* (37 S.L.R. 506) a workman in the employment of a firm of ship-engineers met with an accident while engaged in repairing the boiler of a ship lying in a repairing dock in which she had been placed by the owners. It was held that the ship-engineers, who were appellants, were not liable, as they were not the 'occupiers' of the dock. 'It is not stated,' said the Lord President, 'that the ship had been put into the hands of the appellants, or that they had placed her in the dock, or that they were in possession or charge of her there, or that it was requisite for the repairing of the boiler that she should be put into a dock at all. It is stated that the rates for the occupation of the dock by her were paid by her owners, which would suggest that they had placed her and were in charge of her there, although the appellants were repairing her boilers, while possibly other persons may have been executing other repairs upon her. It therefore appears to me that the appellants cannot be taken to have been the occupiers of the dock in such a sense as to make the Act of 1897 apply to them.'

In *Bruce* v. *Henry and Co.* (37 S.L.R. 511) it was held that a shipping agent, who undertook the loading of a vessel and used a public dock for that purpose, was not an 'occupier' of the dock. No machinery or plant was used by him; otherwise he might have been brought within the Act as the 'occupier' of machinery and plant. (See *Carrington* v. *Bannister* on p. 141.)

In *Merrill* v. *Wilson, Sons and Co., Ltd.* ([1901] 1 K.B. 35;

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83 L.T.R. 490; 17 T.L.R. 49) the respondents moored their ship alongside a quay in a dock belonging to a railway company, for the purpose of unloading. It being admitted that the quay was a factory, the Court of Appeal held that they were 'occupiers' of a factory, quite irrespective of any machinery or plant being used in the process of loading, on the ground that they had the 'actual use or occupation of' the quay, within Sec. 23 of the Factory and Workshop Act, 1895.[1] 'In this case,' said Collins L.J., 'we have a ship moored alongside of a quay; and, for the whole length of the ship, the quayside is devoted to the use of the shipowners for the purpose for which quays are used, namely, for the loading and unloading of a ship and other matters auxiliary thereto. If that is not "actual use" of the quay, I do not see what can be.' **Sec. 7. (2.)**

This decision very much extends the liability of shipowners. The finding that the fact of a vessel being moored alongside a quay to which she intends to discharge renders her owners the 'undertakers' of a factory, will make them liable for any accident that occurs to a workman sent ashore in the course of his employment, both before the loading or unloading is commenced and after it is finished, provided it happens on, in, or about that portion of the quay to which she is moored. For facts of this case, see p. 132.

UNDERTAKER IN THE CASE OF MACHINERY OR PLANT.—In the case of machinery or plant used in the process of loading or unloading, or used temporarily for the purpose of the construction of a building or any structural work in connection with a building, the 'occupier' is, by Sec. 23 of the Factory and Workshop Act, 1895,[1] the person who by himself, his agents, or workmen temporarily uses such machinery for such purposes (p. 119, *ante*).

In *Carrington* v. *Bannister and Co.* ([1901] 1 K.B. 20; 83 L.T.R. 457) a workman met with an accident in the course of his employment as one of a gang of men employed by a firm of coal shippers for the purpose of unloading coal trucks of a railway company into ships lying alongside a quay. The coal was unloaded from the trucks and shot into the ships by means of a hoist and apparatus on the quayside, worked by hydraulic

[1] 58 and 59 Vict. c. 37.

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Sec. 7. (2.) power. This machinery belonged to the railway company, but the County Court Judge found that the shippers had possession and sole control of the entire machinery until the job on which they were engaged was finished—a period of two days. The only point before the Court of Appeal was whether the shippers were, under the circumstances, the 'occupiers' of the machinery, and therefore the 'undertakers' within the meaning of the Act. It was contended on behalf of the shippers that the provision at the end of Sec. 23 (1) of the Factory and Workshop Act, 1895, that 'the person so using any such machinery shall be deemed to be the occupier of a factory' referred only to the machinery mentioned in clause (b) of the sub-section, and not to the machinery mentioned in clause (a). (See p. 119, where section is set out in full.)

The Court of Appeal rejected this contention, and held that as the shippers were clearly persons using the machinery in question for the purposes mentioned in clause (a) of the sub-section (*i.e.* for the purpose of loading and unloading to or from a quay), they were the occupiers of a factory within the latter part of the sub-section.

As to 'undertakers' in the case of machinery and plant, see also *Woodham* v. *Atlantic Transport Co.* ([1899] 1 Q.B. 15; 79 L.T.R. 395; 15 T.L.R. 51); *Lawson* v. *Atlantic Transport Co.* (82 L.T.R. 77; 16 T.L.R. 181); *Stuart* v. *Nixon and Bruce* ([1901] A.C. 79; 84 L.T.R. 65; 17 T.L.R. 156), which are dealt with on p. 122.

'Mine' means a mine to which the Coal Mines Regulation Act, 1887,[1] or the Metalliferous Mines Regulation Act, 1872,[2] applies.

The Metalliferous Mines Regulation Act, 1872[2] (sec. 3), applies to every sort of mine except a coal-mine, and consequently it will be seen that the above definition includes every description of mine.

By Sec. 41 of the same Act the word 'mine' includes 'every shaft in the course of being sunk, and every level and inclined

[1] 50 and 51 Vict. c. 58. [2] 35 and 36 Vict. c. 77.

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plane in the course of being driven for commencing or opening any mine, or for searching for or proving minerals, and all the shafts, levels, plains, works, machinery, tramways and sidings, both below ground and above ground, in and adjacent to a mine and any such shaft, level, and inclined plane, and belonging to the mine. 'Shaft' includes pit. Sec. 7. (2.)

By Sec. 3 of the Coal Mines Regulation Act, 1887,[1] the Act is to apply to 'mines of coal, mines of stratified ironstone, mines of shale, and mines of fireclay'; and by Sec. 75 of the same Act the term 'mine' is to include 'every shaft in the course of being sunk, and every level and inclined plane in the course of being driven, and all shafts, levels, planes, works, tramways and sidings, both below ground and above ground, in and adjacent to and belonging to the mine.' 'Shaft' includes pit.

UNDERTAKER IN THE CASE OF A MINE.—In the case of a mine the 'undertaker' means 'the owner thereof within the meaning of the Coal Mines Regulation Act, 1887,[1] or the Metalliferous Mines Act, 1872,[2] as the case may be' (Sec. 7. (2)).

By the Coal Mines Regulation Act, 1887,[1] sec. 75, the 'owner' of a mine means 'any person or body corporate who is the immediate proprietor or lessee, or occupier of any mine or of any part thereof, and does not include a person or body corporate who merely receives a royalty, rent, or fine from a mine, or is merely the proprietor of a mine subject to any lease, grant, or licence for the working thereof, or is merely the owner of the soil, and not interested in the minerals of the mine; but any contractor for the working of any mine, or any part thereof, shall be subject to this Act in like manner as if he were an owner, but so as not to exempt the owner from any liability.'

Sec. 41 of the Metalliferous Mines Regulation Act, 1872,[2] is to the same effect.

ON, IN, OR ABOUT A MINE.—In *Turnbull* v. *Lambton Collieries Co., Ltd.* (82 L.T.R. 589; 16 T.L.R. 369) the deceased workman was in the employ of a colliery company, who owned a large number of collieries, and also a private railway, about twelve miles in length, which connected the various

[1] 50 and 51 Vict. c. 58. [2] 35 and 36 Vict. c. 77.

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Sec. 7. (2.) collieries with the North-Eastern Railway system. On the day of the accident he was driving a train containing coal to the coal depot belonging to the colliery company; and when the train arrived at a point three-quarters of a mile from the pit's mouth, he met with an accident which caused his death. On a claim for compensation being made by his widow, the County Court Judge decided in her favour on the ground, that, in his opinion, the accident occurred 'on' the Company's works and adjacent to their mine. On appeal, Smith L.J. said:—'To find the definition of "mine" Sec. 75 of the Act of 1887 had to be looked at. Apart from the definition in that section, the accident clearly did not happen 'on or in or about' the mine, because it happened three-quarters of a mile away from the mine. There remained the question whether the meaning of the word 'mine' was enlarged by Sec. 75 of the Act of 1887 so as to include this spot, three-quarters of a mile away. The words in that section, 'adjacent to and belonging to the mine,' meant physically adjacent to and belonging to the mine itself, and not merely belonging to the mineowner. In his opinion there was no evidence upon which the County Court Judge could find that the spot where the accident happened was adjacent to and belonging to the mine.' The appeal was accordingly allowed.

In *Monaghan* v. *United Collieries Ltd.* (38 S.L.R. 92) a workman in the employment of a colliery company was injured whilst uncoupling waggons on a railway near a siding belonging to the Colliery Company. The length of the siding from the colliery to the line was eighty yards; and though the accident happened on the line, it was held that it occurred at a point on the line so near to the siding that it came within the words 'on or about' the siding, which for the purpose of the statute is just as much part of the mine as the underground workings. See definition of 'mine' on p. 142.

'Quarry' means a quarry under the Quarries Act, 1894.

By Sec. 1 of the Quarries Act, 1894,[1] the word 'quarry' is to include 'every place (not being a mine) in which persons

[1] 57 and 58 Vict. c. 42.

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work in getting slate, stone, corprolites, or other minerals, and any part of which is more than twenty feet deep.' Sec. 7. (2.)

It will be observed that for any place to become a quarry within the meaning of the Quarries Act, 1894,[1] some part of it must be more than twenty feet deep. The accident need not happen on the part which is more than twenty feet deep, but it must happen on a place in which people are working for the purposes mentioned, and some part of which exceeds that depth.

> 'Engineering work' means any work of construction or alteration or repair of a railroad, harbour, dock, canal, or sewer, and includes any other work for the construction, alteration, or repair of which machinery driven by steam, or water, or other mechanical power is used.

It is clear that any work of construction or alteration or repair of a railroad, harbour, dock, canal, or sewer is an 'engineering work' whether machinery driven by steam, water, or other mechanical power is used thereon or not; but to constitute 'any other work' an 'engineering work,' there must be used in its construction, repair, or alteration machinery driven by such means.

RAILROAD.—In *Fullick* v. *Evans, O'Donnell and Co., Ltd.* (84 L.T.R. 413; 17 T.L.R. 346) the question arose as to whether the word 'railroad' had the same meaning as the word 'railway' used elsewhere in the Act (see p. 112), or whether it had a more restricted meaning. The applicant was employed by the respondents in erecting a signal-box on a new railway, which was being constructed by another contractor. Whilst so employed he was injured by an accident, and on a claim for compensation being made, the County Court Judge held that at the time of the accident the applicant was employed

[1] 57 and 58 Vict. c. 42.

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Sec. 7. (2.) on, in or about 'engineering work' within the meaning of this sub-section, and awarded him compensation.

On appeal it was contended that the word 'railroad' in the definition of 'engineering work' meant only the permanent way, the bridges and other works connected therewith, the word not being so wide as the word 'railway,' as defined by the Regulation of Railways Act, 1873[1] (see p. 112). It was admitted that the work on which the applicant was engaged would be included in the word 'railway,' but in that case the applicant's employers would not be the 'undertakers.' The Court of Appeal refused to recognise this distinction, Smith M.R. observing that he saw no difference between the two words, whilst Collins L.J. said that whether the Act spoke of a 'railroad' or 'railway,' in his opinion a signal-box came within the term. See note on p. 78.

ANY OTHER WORK.—The words 'any other work,' taken apart from the rest of the definition, are very wide. They refer to work of construction, alteration, or repair of 'something' for the construction, repair, or alteration of which the machinery is used. What is that 'something'? Does it include 'any other work' of any description, provided it is work of construction, alteration, or repair, or does it only refer to work of the same kind and nature as the work done on a railway, harbour, dock, canal or sewer? This question has been answered by the Court of Appeal in *Cosgrove* v. *Partington* (17 T.L.R. 39), where it was held that 'any other work' is not limited to work *ejusdem generis* with that which would ordinarily be called engineering work. The applicant was engaged in putting a new top story on to a mill, the work including the hoisting of iron girders by means of a steam winch, when he was injured by an accident. It was held that the employment was an 'engineering work' within this sub-section, Smith M.R. refusing to cut down the meaning of the section by limiting the words 'any other work' to work *ejusdem generis* with the work mentioned in the previous part of the sub-section, on the ground that those words were used for the purpose of enlarging the meaning of engineering work.

[1] 36 and 37 Vict. c. 48.

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In *Berwickshire County Council* v. *Middlemiss* (37 S.L.R. 297) a section of road was under repair by a steam roller, with a water-cart which was used to water those parts of the road on which metal had been placed, in order that they might be rolled. As the driver of the water-cart was yoking his horse about a quarter of a mile away from the steam roller, the horse bolted, with the result that the driver was run over and killed. It was held that the work of repairing roads on which a steam roller was employed was an 'engineering work,' and that the driver of the cart was employed on, in or about that work at the time of the accident. Sec. 7. (2.)

In *Reid* v. *P. R. Fleming and Co.* (38 S.L.R. 720) a firm of engineers had sold a hay-cutter, and had undertaken to fit it up and have it in working order in their customer's premises. A workman was engaged in fitting up the hay-cutter, and, in doing so, used only manual labour. But from time to time, as the erection of the hay-cutter proceeded, it was necessary for him to test it, in order to ascertain whether it was so far properly fitted, and this he did by applying mechanical power. When it was partially erected and the workman was engaged in so testing it by mechanical power, his left hand was caught in it and injured.

It was held by the Court of Session that the injured workman was employed on an 'engineering work' of which the respondents were undertakers, on the ground that what he was doing when he sustained the injury was a 'work' (which was included in the expression 'any other work') for the 'construction of which machinery driven by mechanical power was used.'

In *Rae* v. *Fraser* (36 S.L.R. 782) an air compressor was being lifted on to a lorry by means of a hydraulic jack. It was held that this was not a work of 'construction, alteration, or repair' and therefore not an 'engineering work.'

LIMITS OF ENGINEERING WORK.—There must be a fixed locality in the case of an engineering work, just as in the case of a railway, factory, mine, or quarry. The question whether 'engineering work' pointed to a locality, or to the work on which a man was employed wherever going on, was raised

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Sec. 7. (2.) before the Court of Appeal in *Chambers* v. *Whitehaven Harbour Commissioners* ([1899] 2 Q.B. 132; 80 L.T.R. 586; 15 T.L.R. 341; see p. 92, *ante*). In this case a man employed on a dredger dredging a harbour went a mile and a half out to sea on a barge filled with mud, which had been dredged from the harbour, for the purpose of emptying it into the sea, and whilst doing so was drowned. It was held that, in order to bring a case within the purview of the Act, the employment must be on, in, or about the named locality, (*e.g.* the engineering work) at the time of the accident, and consequently no compensation was payable in respect of this man's death, as, at the time of the accident, he was a mile and a half away from the 'engineering work.' As a matter of fact, the Court did not decide whether this particular work constituted an 'engineering work' or not.

MECHANICAL POWER.—For what constitutes 'mechanical power,' see note on p. 137, *ante*.

UNDERTAKER IN THE CASE OF AN ENGINEERING WORK.—The 'undertaker' in the case of an engineering work means 'the person undertaking the construction, alteration, or repair' (Sec. 7 (2)).

'Undertakers' in the case of a railway means the railway company; in the case of a factory, quarry, or laundry means the occupier thereof within the meaning of the Factory and Workshop Acts, 1878 to 1895; in the case of a mine means the owner thereof within the meaning of the Coal Mines Regulation Act, 1887, or the Metalliferous Mines Regulation Act, 1872, as the case may be, and in the case of an engineering work means the person undertaking the construction, alteration, or

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repair; and in the case of a building means the persons undertaking the construction, repair or demolition. Sec. 7. (2.)

For remarks on 'undertakers' generally, see p. 88.

For 'undertakers' in the case of a railway, see notes on p. 114.

For 'undertakers' in the case of a factory, quarry, or laundry, see notes on p. 138.

For 'undertakers' in the case of a mine, see notes on p. 143.

For 'undertakers' in the case of an engineering work, see p. 148.

For 'undertakers' in the case of a building, see p. 110.

For 'undertakers' in the case of a dock, wharf, quay, or warehouse, see p. 139.

For 'undertakers' in the case of machinery and plant, see p. 141.

'Employer' includes any body of persons corporate or unincorporate and the legal personal representative of a deceased employer.

This definition is very advantageous to workmen, as they can now recover compensation notwithstanding the death of their employers, whereas under the old law the liability of the employer ceased with his death. If, for instance, a defendant in an action under the Employer's Liability Act, 1880,[1] dies before judgment is obtained against him, the cause of action ceases, as his personal representative will not be held liable to pay (*Gillett* v. *Firbank*, 3 T.L.R. 618). But a claim for compensation can be made against an employer's personal representative just as against the employer himself.

By Sec. 1 (1) the 'employer' is made liable to pay compensation, but a reference to Sec. 7 will show that in all cases it is in fact the 'undertaker' who is liable to pay, whether he is the employer or not (see notes on p. 15). It is presumed, then, that the 'undertaker' is included in this definition of

[1] 43 and 44 Vict. c. 42.

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Sec. 7. (2.) 'employer,' so that if the 'undertaker' dies, his liability will descend to his legal personal representative.

'Workman' includes every person who is engaged in an employment to which this Act applies, whether by way of manual labour or otherwise, and whether his agreement is one of service or apprenticeship or otherwise, and is expressed or implied, is oral or in writing. Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependants, or other person to whom compensation is payable.

EVERY PERSON.—The expression 'every person who is engaged in an employment to which this Act applies, whether by way of manual labour or otherwise,' makes this definition very extensive. It appears to include any person who is employed on, in, or about any of the employments mentioned in Sec. 7 (1), whether he is engaged in manual labour or not. If so, the term 'workman' includes clerks, foremen, managers, etc., who are employed on the premises mentioned in that sub-section, even though they have no manual labour to perform at all. If that is so, the Workmen's Compensation Act will apply to a much more numerous class of servants than does the Employer's Liability Act, 1880, under which 'workman' means 'any person being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour.[1] Under the latter Act only workmen engaged in some kind of manual labour are included, but under this Act it appears to make no difference whether they are engaged in manual labour or not, provided the accident happens when they are engaged on, in, or about

[1] 43 and 44 Vict. c. 42 s. 8; and 38 and 39 Vict. c. 90 s. 10.

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one of the employments specified in Sec. 7 (1). Thus, if a clerk, engaged in a factory, met with an injury caused by accident arising out of and in the course of his employment on, in, or about the factory, it appears that he could recover compensation from the undertakers just as a labourer could, because he is a 'person engaged in an employment to which the Act applies,' otherwise than by manual labour. Sec. 7. (2.)

CAN AN INDEPENDENT CONTRACTOR BE A 'WORKMAN'?—This question came before the Court of Appeal in *Simmons* v. *Faulds* (17 T.L.R. 352). The applicant was a foreman bricklayer, who was injured by an accident while engaged in a building operation. The applicant had contracted with Faulds to do the job in question for £160, the applicant to find the labour and tools but not any of the material, and to be paid as the work progressed. Upon these facts the County Court Judge was of opinion that the applicant, though he was a sub-contractor, was a 'workman' within the meaning of the Act. The Court of Appeal allowed an appeal, Smith M.R. saying that the Act applied to workmen only, and not to contractors, and the evidence was clear in that case that the applicant was a contractor.

From the report of the case, which is very brief, the Court does not appear to have stated upon what grounds it was of opinion that a contractor could not be a workman. This is to be regretted, as owing to the wording of the definition it does not seem necessary that the workman should be in the service of the employer at all. The expression 'workman' includes 'every person who is engaged in an employment to which the Act applies,' and 'whether his agreement is one of service or apprenticeship or otherwise.' It appears that it would include an independent contractor, who is injured whilst engaged upon one of the employments specified in Sec. 7 (1), for though the contract with the undertaker would not be one of service, it would be an agreement 'made otherwise.' Such a case came before the Judge of the Greenwich County Court in *Burrell* v. *Avis* (106 Law Times 61). The respondent was a builder, and Burrell entered into a contract with him to do the 'carcassing' to two houses, the respondent finding the

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Sec. 7. (2.) materials, but Burrell finding the tools and paying the labourer who assisted him. Burrell worked as and when he liked without consulting the respondent, who had no power to dismiss him as he was working under the contract. On one occasion, when going up a step-ladder for the purpose of his work, he fell and was killed. On these facts it was contended that Burrell was not a workman, but an independent contractor, whereas the Act contemplated the relationship of master and servant. On the other hand, it was contended that he was a workman, and came within the definition in this Act—a contention which the County Court Judge accepted.

Following the argument used in that case, that Burrell came within the words 'or otherwise,' it is difficult to see why an architect who is injured on a building, which is within the Act, cannot obtain compensation from the undertaker. True, he is not a workman in the ordinary sense, as the relationship of master and servant does not exist between the undertaker and him; but he is nevertheless engaged in an employment to which the Act applies (namely, on, in, or about the building), and his agreement with the undertaker, though not one of service or apprenticeship, is one made 'otherwise.'

The same point as to whether a contractor or sub-contractor could be a workman was raised in the Scotch case of *M'Gregor* v. *Dansken* (36 S.L.R. 393), where the Second Division of the Court of Session (Lord Young dissenting) held that he could not, on the ground that a contractor was impliedly excluded from claiming compensation by the terms of Sec. 4 of the Act. Whether the decision itself was right or not, it is submitted that the ground upon which it was arrived at is clearly wrong. The question before the Court was whether the contractor was a workman or not. If he was a workman within the Act, there is nothing in Sec. 4 to take away his right to compensation; on the contrary, that section, as far as the workman is concerned, is an enabling and not a disabling one.

On the other hand, in the Scotch case of *Dunlop and Co.* v. *M'Cready* (37 S.L.R. 779), which came before the First

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Division of the Court of Session, the Lord President expressed his opinion that under certain circumstances a contractor could be a workman within the meaning of the Act. 'The words "or otherwise" in the definition,' he said, 'mean whether his agreement is otherwise than one of service, or otherwise than one of apprenticeship, showing that the *benefits of the Act are not confined to persons under contracts of service or apprenticeship.*' Sec. 7. (2.)

In view of the difficulties that surround the question, it seems unfortunate that the Court of Appeal in *Simmons* v. *Faulds* (*supra*) did not express an opinion as to the grounds on which they came to the conclusion arrived at, as it would have been a guide for Arbitrators in the future. Of course, as the decision stands, it must be followed, but it is to be hoped that a clear elucidation of what classes of people the definition of 'workman' includes will be shortly forthcoming.

LEGAL PERSONAL REPRESENTATIVE OR DEPENDANTS.—A deceased workman's legal personal representative is his executor or administrator, and the term 'dependants' is discussed under the next definition. As to the exercise of the option given by Sec. 1 (2) (*b*) and Sec. (6), when the workman is dead, see p. 21.

OTHER PERSON TO WHOM COMPENSATION IS PAYABLE.—The 'other person' here mentioned is the person to whom are due the expenses of the deceased workman's medical attendance and burial (Schedule I. (1) (*a*) (iii) and (4)).

WHO IS TO INSTITUTE PROCEEDINGS WHEN THE WORKMAN IS DEAD?—By this sub-section 'any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependants, or other person to whom compensation is payable.' The intention of this appears to be, that if there is a personal representative, he is the one to commence proceedings; but if there is none, that then the dependants are to proceed, and that, failing both personal representative and

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Sec. 7. (2.) dependants, the 'other person shall have the right to take proceedings to recover compensation.' This view is borne out by a reference to Schedule I. (4), which provides that the payment of compensation, in case of death, is to be made to the legal personal representative of the workman, or, if he has none, to or for the benefit of his dependants, or, if he has no dependants, to the person to whom the expenses are due. From this also it appears that the personal representative has the right to make the claim on behalf of the dependants or of the person to whom the expenses are due. Turning to the Rules, it will be seen that Rule 4 provides that an application on behalf of the dependants of a deceased workman shall be made by the legal personal representative, if any, but that if there is no such legal personal representative, the application may be made by the dependants themselves. Thus it would appear that the Rules do not permit the dependants to make a claim if there is a legal personal representative (though it is doubtful whether they have power to prevent them doing so), and it is here that the difficulty arises. If the dependants are bound to proceed by means of the legal personal representative, circumstances might arise which would prevent them from obtaining compensation at all. The legal personal representative and the dependants might have conflicting interests. Supposing the legal personal representative were not a dependant, but had a claim under Lord Campbell's Act,[1] it would be to his interest to proceed under that Act to obtain damages for himself and the dependants. But it might be to the advantage of the dependants to obtain the fixed compensation provided by this Act, in which the legal personal representative could not share. If, then, the legal personal representative refuses to act, can the dependants themselves proceed to arbitration? By the Act, the dependants are entitled to compensation, and it would be strange if they could not commence proceedings to obtain it. If, again, the legal personal representative commences proceedings under Lord Campbell's Act,[1] can the dependants proceed at the same time under this Act? If so, is the personal representative, who is entitled to damages, to be deprived of his rights because the depend-

[1] 9 and 10 Vict. c. 93.

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ants have obtained compensation, or *vice versa*? Such questions are technical, indeed, but they may arise owing to the wording of this sub-section.

Sec. 7. (2.)

'Dependants' means—

(*a*) in England and Ireland, such members of the workman's family specified in the Fatal Accidents Act, 1846,[1] as were wholly or in part dependent upon the earnings of the workman at the time of his death; and

(*b*) in Scotland, such of the persons entitled according to the law of Scotland to sue the employer for damages or solatium in respect of the death of the workman, as were wholly or in part dependent upon the earnings of the workman at the time of his death.

The members of the workman's family specified in the Fatal Accidents Act, 1846,[2] otherwise known as Lord Campbell's Act, are the wife, husband, parent (which includes father and mother, grandfather and grandmother, and stepfather and stepmother) and child (which includes son and daughter, grandson and granddaughter, and stepson and stepdaughter) of the person whose death has been caused.

Hence in the event of the death of a workman from injuries caused by accident under such circumstances as to bring it within the Act, any or all of the above-named relations or connections can recover compensation, provided he, she, or they were wholly or in part dependent upon the earnings of the workman at the time of his death.

A 'child' will not include an illegitimate child, as an

[1] 9 and 10 Vict. c. 93.
[2] 9 and 10 Vict. c. 93, Sections 2 and 5.

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Sec. 7. (2.) illegitimate child is not a 'child' within the scope of Lord Campbell's Act[1] (*Dickinson* v. *North-Eastern Railway Co.*, 33 L.J.Ex. 91). Consequently a bastard has no claim for compensation in respect of the death of a parent, nor has a parent in respect of the death of a bastard child (*Clement* v. *Thomas Bell and Sons*, 36 S.L.R. 725).

A DEPENDANT MUST BE DEPENDENT.—A dependant must to some extent have been dependent upon the earnings of the deceased workman for the ordinary necessaries of life, having regard to his class and position in life; it is not enough that he merely derived pecuniary benefit from such earnings. Whether an applicant is in that sense a dependant is a question of fact for the Arbitrator to decide in each particular case, and his finding will not be set aside by the Court of Appeal, excepting on the ground that there was no evidence to support it.

In *Simmons* v. *White Brothers* ([1899] 1 Q.B. 1005; 80 L.T.R. 344; 15 T.L.R. 263), the deceased was a boy of fourteen in the same employ as his father. The evidence showed that the deceased lived with his father and mother. He brought his wages home weekly, and they were taken by his parents and put into what formed a common fund, his father giving him a portion of his wages for pocket-money, the rest helping to maintain the family. The County Court Judge found that the parents were in part dependent on the earnings of the deceased, and this decision was upheld by the Court of Appeal on the ground that they would not say that there was no evidence on which the County Court Judge could find as he did.

The decision in *Davies* v. *The Main Colliery Co., Ltd.* (80 L.T.R. 674; and on Appeal [1900] A.C. 358; 83 L.T.R. 83; 16 T.L.R. 460) was to the same effect, though there was perhaps less evidence of actual dependency on the earnings of the boy. The father and mother lived together in a common household with their six children, including the boy who was killed. The father earned 25s. a week, one of the daughters earned 12s., another 7s., the boy 8s., and the mother and the other three children nothing. The money earned was put into a common fund, and was used for the purpose of the common

[1] 9 and 10 Vict. c. 93.

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household. The County Court Judge assumed that the boy's keep would amount to 5s. a week, and held that the applicants were 'dependent' on his earnings, and accordingly made an award in their favour. On appeal it was contended that there was no evidence that the father was dependent on the earnings of the deceased boy for any necessaries of life, but the Court of Appeal were of opinion that there was, and refused to interfere with the award. The case was taken to the House of Lords with the same result, all the Lords of Appeal being of opinion that there was dependency in the case.

See also *Savoury* v. *Great Northern Railway Co.* (107 Law Times 236).

WHOLLY OR IN PART DEPENDENT.—It is for the Arbitrator in each case to determine, not only whether the applicant is dependent, but also whether he is wholly or in part dependent, and in the latter event to decide to what extent he was dependent.

In the case of death, where dependants were wholly dependent upon the earnings of the deceased, with one exception, no discretion is left to the Arbitrator as to the sum he shall award. Whether there be only one dependent left or many, the award must be for a sum equal to three years' wages. The one exception is that, where the three years' wages exceed £300, only that amount can be awarded. (Schedule I. (1) (*a*) (i).)

Supposing a husband and wife are both earning wages (*e.g.*, the husband 25s. a week and the wife 18s. a week), when the husband is killed by an accident. On a claim for compensation being made by the wife, can it be said that she was *wholly* dependent upon the earnings of her husband *at the time of his death*? There can be no doubt that she was partially dependent, but it is submitted that where the wife at the time of her husband's death was earning enough to keep herself, it cannot be said that she was wholly dependent upon his earnings. This question was considered in the Scotch case of *Cunningham* v. *James M'Gregor and Co.* (38 S.L.R. 574), where it was proved that a husband who was killed, had for three years preceding his death lived apart from his wife and family, and

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Sec. 7. (2.) his contribution towards their support was only about £5 a year. It was held that the widow was wholly dependent on her husband at the time of his death, as she had herself only occasional and precarious employment, and her main means of support were charitable contributions by her relatives. It was pointed out, however, in the judgments delivered that the decision might have been different if she had been earning her own livelihood. As, however, in the case of partial dependency there is nothing to prevent an Arbitrator, if he thinks fit, from awarding the same amount of compensation as he could award where the dependant was wholly dependent, it matters little whether, under the circumstances mentioned, he regards the wife as being wholly or partially dependent. (See p. 172.)

Supposing again, under similar circumstances, the wife is killed by an accident. Can the husband be said to be dependent upon her earnings at the time of her death? The husband is included as a member of the workman's family in Lord Campbell's Act[1] (see p. 155), and though earning enough to keep himself and family, if the wife's earnings in fact helped to maintain the family, then, in view of the decision in *Davies* v. *Main Colliery Co., Ltd.* (*supra*), it is submitted that an Arbitrator would be justified in holding that the husband was in part dependent upon the earnings of his wife.

SOME WHOLLY, OTHERS IN PART DEPENDENT.—If there are some wholly dependent and others partially dependent, does the claim by those who are wholly dependent exclude those who are only in part dependent? In other words, does the fact that the deceased left a dependant wholly dependent on him exclude the claim of one who was in part dependent upon him? In a case in Scotland, *Fagan* v. *Murdoch* (36 S.L.R. 921) this question was answered in the affirmative, on the ground that Schedule I. (1), which provides for the amount of compensation to be awarded, presents three alternative cases which are mutually exclusive. That is to say, if there are dependants wholly dependent, then the employer has to pay three years' wages; but if there are not, then the partial dependants come in, whereas if the deceased

[1] 9 and 10 Vict. c. 93.

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has left any wholly dependants, the Act provides nothing for those partially dependent. The argument is based on the words appearing at the commencement of Schedule I. (1) (*a*) (i) (ii) and (iii). Sec. 7. (2.)

This decision does not appear to be the correct interpretation of those clauses. Though it is a possible construction of them, taken with other words in the Act, it appears to be too narrow a one. There are other clauses in the Schedule which show that it was the intention of the Legislature that both those who are wholly and those who are in part dependent are intended to share in the benefit. Schedule I. (1) (*a*) (i) appears to simply give directions for ascertaining the total amount of compensation to be paid, and not to decide as to whom that ascertained amount shall be paid. Schedule I. (4) directs that 'payment shall, in case of death, be made to the legal personal representative of the workman, or, if he has no legal personal representative, *to or for the benefit of his dependants*'; and Schedule I. (5) states that 'any question as to who is a dependant, *or as to the amount payable to each dependant*, shall, in default of agreement, be settled by arbitration.' Again, the definition of 'dependants' given in this sub-section of the Act appears to include *all* dependants, whether wholly or in part dependent, and consequently it would appear that there is nothing in either the Act or Schedule I. to show that the existence of persons wholly dependent excludes the claims of persons who are in part dependent, but rather that the total amount of compensation, when once ascertained under Schedule I. (1) (*a*) (i) must be distributed by the Arbitrator, as he thinks fit, among those wholly and those in part dependent.

DEPENDENT AT THE TIME OF HIS DEATH.—These words will probably be construed to mean 'dependent at the time of the accident which caused his death.' Death does not always occur immediately after the accident; a man might be injured in an accident and linger on for some weeks before he died. Suppose such a case occurred. A is injured by accident on January 1 so seriously that he is taken to a hospital, where he lies for five months, and then dies on June 1. During those five months negotiations might have been

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Sec. 7. (2.) proceeding, for payment to the injured man of compensation in weekly sums, but no agreement come to. On June 1 there could not be any one dependent upon his earnings at the time of his death, for he had earned nothing since January 1. Yet the Act must be intended to include such a case, and although the point has not been brought before the Court of Appeal, it will no doubt be held that the words 'at the time of his death' must not be so strictly construed, as to exclude from the benefit of the Act dependants, who were dependent upon the earnings of the deceased at the time when he met with the injury which eventually caused his death.

These words also show there is a distinction between dependency under this Act and dependency under Lord Campbell's Act,[1] though the persons who are entitled to receive compensation, as we have already seen, are the same. If an applicant has to be one who was dependent on the earnings of the deceased 'at the time of his death,' this Act will not include one who, having received past pecuniary assistance, has a reasonable expectation of receiving assistance in the future, though at the time of the death of the deceased he was in actual receipt of no relief from him. Yet he could recover under Lord Campbell's Act[1] under such circumstances, as under that Act the plaintiff need not be receiving pecuniary assistance at the time of the death, provided that there are circumstances to show that there was a reasonable expectation of future pecuniary help. (See *Hetherington* v. *North-Eastern Railway Co.*, 9 Q.B.D. 160.)

POSTHUMOUS CHILD.—Can a posthumous child be regarded as being 'dependent upon the earnings of the workman at the time of his death'? It has been held that, under Lord Campbell's Act,[1] a posthumous child, if born within due time, has a right of action (*The George and Richard.* L.R. 3 Adm. 466). It is thought, then, that such a child has a right to compensation. The difficulty of the question is in the words 'dependent at the time of his death.' But as a posthumous child is generally considered *in esse* for its benefit, but not for its prejudice, it is submitted that it will be dependent within

[1] 9 and 10 Vict. c. 93.

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the meaning of the Workmen's Compensation Act. The question is of importance when a claim for compensation is made by a widow in respect of the death of her husband, and the Arbitrator has to determine whether he can order any sum to be invested for the benefit of a posthumous child. Sec. 7. (3.)

(3) A workman employed in a factory which is a shipbuilding yard shall not be excluded from this Act by reason only that the accident arose outside the yard in the course of his work upon a vessel in any dock, river, or tidal water near the yard. Sec. 7. (3.)

This Act does not ordinarily apply to ships or seamen, but where a workman is employed in a shipbuilding yard, which is a factory, he will have the benefit of it though the accident occurred outside the yard, provided it arose in the course of his work on a vessel in any dock, river, or tidal water near the yard.

To make a shipbuilding yard a factory, there must be steam, water, or other mechanical power used in it (41 and 42 Vict. c. 16 s. 93, Schedule IV. (24). See p. 116, *ante*).

NEAR A SHIPBUILDING YARD.—The question whether the dock, river, or tidal water is 'near' the shipbuilding yard is a question of fact to be determined by the Arbitrator. In *Barclay, Curle and Co.* v. *M'Millan* (37 S.L.R. 61) a workman was injured while working on a ship which had been removed from the shipbuilding yard to a dock about two miles away, in order to be completed. The Sheriff-Substitute decided that under the circumstances the dock was 'near' to the shipbuilding yard, and on appeal the Court of Session held that the question whether a dock was near a yard was one of fact and not of law, and that the appeal was therefore incompetent. But the Court expressed its agreement with the finding of the Sheriff-Substitute on the facts, Lord M'Laren observing that the expression 'near a shipbuilding yard' must receive a wider meaning than the expression 'on, in, or about' a factory,

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Sec. 7. (3.) because if the words had meant the same thing, this sub-section would have been altogether unnecessary.

REPAIRS TO SHIP IN A DOCK.—The fact that repairs are being done to a ship in a dock does not make the dock a 'shipbuilding yard' within the meaning of the Factory and Workshop Act, 1878,[1] Schedule IV. Part II. (24), and therefore a 'factory' within the meaning of this sub-section of the Workmen's Compensation Act. (*Spencer* v. *Livett, Frank and Son* [1900] 1 Q.B. 498; 82 L.T.R. 75; 16 T.L.R. 179 (see p. 129, *ante*); *Abernethy and Co.* v. *Low*, 37 S.L.R. 506; *Jackson* v. *A. Rodger and Co.*, 37 S.L.R. 390).

Sec. 8. (1.) Application to workmen in employment of Crown.

8.—(1.) This Act shall not apply to persons in the naval or military service of the Crown, but otherwise shall apply to any employment by or under the Crown to which this Act would apply if the employer were a private person.

Sec. 8. (2.) (2.) The Treasury may, by warrant laid before Parliament, modify for the purposes of this Act their warrant made under section one of the Superannuation Act, 1887,[2] and notwithstanding anything in that Act, or any such warrant, may frame a scheme with a view to its being certified by the Registrar of Friendly Societies under this Act.

By this section all persons engaged in the service of the Crown, except those engaged in naval or military service, in any of the employments to which the Act applies, come within the Act. The Treasury, like any other employer, may frame a scheme which their workmen may accept instead of the benefits conferred by the Act, but such a scheme must be certified by the Registrar of Friendly Societies according to the provisions of Sec. 3. The following extract is taken from

[1] 41 and 42 Vict. c. 16. [2] 50 and 51 Vict. c. 67.

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the report of the Chief Registrar of Friendly Societies for 1899 (Part A, p. 24), which shows that such a scheme has been certified and is now in operation:—'On the 24th June 1898, their Lordships transmitted to me a scheme which they had caused to be prepared. On the 27th June they directed a further communication to be addressed to this office as to that part of the scheme relating to injury pay, and on the 2nd July they modified the scheme by substituting for some of its provisions the exact provisions of the Act. A notification was drawn up in the usual way of the contents of the scheme, and was transmitted to the various departments interested, which were requested to cause copies to be hung up in every workshop where men affected by the scheme were to be found, giving them the usual opportunity of addressing communications to the Registrar. As a result twenty-three communications were received, and these were taken into consideration by the Treasury Authorities and the Registrar, and answers given to them. The scheme, in a somewhat modified form to meet the suggestions of some of the workmen, was finally certified on 17th May 1899.' **Sec. 8. (2.)**

Sec. 9. Provision as to existing contracts.

9. Any contract existing at the commencement of this Act, whereby a workman relinquishes any right to compensation from the employer for personal injury arising out of and in the course of his employment, shall not, for the purposes of this Act, be deemed to continue after the time at which the workman's contract of service would determine if notice of the determination thereof were given at the commencement of this Act.

Contracting out, except as provided for in Sec. 3, is not permitted under this Act, and therefore this section provides for the determination of all such contracts that were in existence when the Act came into operation.

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Sec. 9.

FOR THE PURPOSES OF THIS ACT.—A contract in existence is only determined 'for the purposes of this Act.' This section therefore will not affect any existing contract by which the workman foregoes any rights under the Employer's Liability Act, 1880,[1] or at common law.

Sec. 10. (1.) Commencement of Act and short title.

10.—(1.) This Act shall come into operation on the first day of July one thousand eight hundred and ninety-eight.

Sec. 10. (2.)

(2.) This Act may be cited as the Workmen's Compensation Act, 1897.

[1] 43 and 44 Vict. c. 42.

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FIRST SCHEDULE

SCALE AND CONDITIONS OF COMPENSATION

Scale

(1.) The amount of compensation under this Act shall be— Sched. I. (1.) (a).

(*a*) Where death results from the injury—

(i) If the workman leaves any dependants wholly dependent upon his earnings at the time of his death, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of one hundred and fifty pounds, whichever of those sums is the larger, but not exceeding in any case three hundred pounds, provided that the amount of any weekly payments made under this Act shall be deducted from such sum, and if the period of the workman's employment by the said employer has been less than the said three years then the amount of his earnings during the said three years shall be deemed to be

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Sched. I. (1.) (a).

156 times his average weekly earnings during the period of his actual employment under the said employer;

(ii) If the workman does not leave any such dependants, but leaves any dependants in part dependent upon his earnings at the time of his death, such sum, not exceeding in any case the amount payable under the foregoing provisions, as may be agreed upon, or, in default of agreement, may be determined, on arbitration under this Act, to be reasonable and proportionate to the injury to the said dependants; and

(iii) If he leaves no dependants, the reasonable expenses of his medical attendance and burial, not exceeding ten pounds.

WHERE DEATH RESULTS FROM THE INJURY. — The dependants are only entitled to compensation when 'death results from the injury,' and as by Sec. 1 (1) the injury must be 'caused' by accident, it follows that, for the dependants to be entitled to compensation, the *death must be caused by accident.* What, then, is the position when death is not caused by, but only accelerated by, the injury? Take the case of a man suffering from phthisis, who in any case would have died within six months, but owing to injuries received by accident, dies within six weeks, not from those injuries but from his previous complaint, his death being only accelerated by the injuries he sustained. Under such circumstances, can it be said that his injuries 'resulted in death' or that his death 'was caused by accident'? It is submitted that it cannot, as the cause of death was phthisis, which was present before the injuries were sustained. See *Hensey* v. *White* on p. 2.

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When the workman does not die, but some disease which he had is accelerated by the accident, it is possible to compensate him proportionately to the injury suffered by making a terminable award, the weekly payments to be continued during the period of incapacity attributable to the accident. (See *Ward* v. *London and North-Western Railway Co.* at p. 173.) But in the case of death this could not be done, as the amount of compensation is a fixed sum. **Sched. I. (1.) (a).**

DEPENDANTS.—For definition of 'dependants' see Sec. 7 (2), and notes thereon at p. 155.

AT THE TIME OF HIS DEATH.—For the meaning of these words see notes under Sec. 7 (2) at p. 159.

AMOUNT OF COMPENSATION IN CASE OF DEATH. — The amount of compensation payable when death results from the injury may be considered under the following three heads :—

I. When there are dependants wholly dependent.
II. When there are dependants in part dependent.
III. When there are no dependants.

I.—DEPENDANTS WHOLLY DEPENDENT. **Sched. I. (1.) (a) (i).**

(*a*) *Where the workman has been in the employment of the same employer during the three years preceding the injury.*

In this case the amount of compensation is a sum equal to the workman's earnings during the three years preceding the injury, or £150, whichever sum is the larger, but in no case must it exceed £300. Hence no difficulty can arise in arriving at the sum to be paid, as it is calculated from the exact amount earned during a fixed period.

(*b*) *Where the workman has not been in the employment of the same employer during the three years preceding the injury.*

In this case the amount of compensation is a sum equal to 156 times his average weekly earnings during the period of his actual employment by the same employer, or £150, whichever sum is the larger. The minimum sum of £150 applies not only to cases where the workman has been in the employment for three years, but also to cases where he has not been so long employed ; that is to say, when the period of employment has

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Sched. I. (1.) (*a*) i).

been less than three years, the amount that can be awarded is not limited to 156 times the workman's average weekly earnings where that sum is less than £150 (*Robert Forrester and Co.* v. *M'Callum*, 38 S.L.R. 448. See *dictum* of Lord Macnaghten in *Lysons* v. *Knowles* [1901] A.C., at p. 93). Similarly the maximum amount of compensation, viz. £300, that can be awarded applies both to cases where the workman has been three years in the same employment and cases where he has not been so long employed. (*Russell* v. *M'Luskey*, 37 S.L.R. 931.)

In a Scotch case (*Leonard* v. *William Baird and Co., Ltd.*, 38 S.L.R. 649), it has been held that where a man was killed by accident arising out of and in the course of his employment, his widow was entitled to the alternative sum of £150, although he died before he had time to earn any wages. The deceased was a miner, and was killed after he had descended his employer's pit but before he had actually commenced work. Dealing with the 'earnings,' no sum could be arrived at, and the sum was therefore fixed according to the alternative given in Schedule I. (1) (*a*) (i). Had the man, however, only been incapacitated, it is difficult to see how he could have recovered any compensation, as, in the case of incapacity, the compensation payable is calculated on his 'average weekly earnings,' and there is no alternative as there is in this clause. (See Schedule I. (1) (*b*).)

In another Scotch case, *Doyle* v. *Beattie and Sons* (37 S.L.R. 915), it was held that where the injuries do not immediately incapacitate a workman, who accordingly returns to work after the accident and is ultimately incapacitated, his earnings during the period since the accident can be taken into account.

AVERAGE WEEKLY EARNINGS.—The decision of the Court of Appeal that, to enable the 'average weekly earnings' to be ascertained, there must be 'earnings' for at least two weeks, has been reversed by the House of Lords (*Lysons* v. *Andrew Knowles and Sons, Ltd.*, and *Stuart* v. *Nixon and Bruce* [1901] A.C. 79; 84 L.T.R. 65; 17 T.L.R. 156). The effect of the decision of the Court of Appeal was that, to come within the Act, a workman must have been employed for at least two weeks by the same employer. This, however, is no longer law, and the

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right to compensation is not restricted to employment by the week, or for weekly wages, or for two weeks at least, but employment by the day for one or more days is within the Act. Sched. I. (1.) (a) (i).

For further notes on this subject and as to what constitutes a week, see p. 175.

AVERAGE WEEKLY EARNINGS: HOW ARRIVED AT.—If a workman has been employed continuously for two weeks or more, no difficulty arises in assessing the amount of compensation, as the average weekly earnings are easily found by dividing the total earnings by the number of weeks he has been employed.

But if there has been a break in the employment—through sickness, for instance—the question then arises, how is the average to be found? Are the total earnings to be divided by the number of weeks the workman has been in the employment, or by the number of weeks he has actually worked? From a consideration of the case of *Keast* v. *The Barrow Hematite Steel Co.* (15 T.L.R. 141), which is dealt with under Schedule I. (1) (*b*) at p. 180, it will be seen that, to find the 'average weekly earning,' the total amount of the earnings during the period of employment ought to be divided by the number of weeks the employment continued, provided there has been no real break in it, and not by any less number, excluding the weeks when the man was not at work. See notes under Schedule I. (1) (*b*), at p. 180.

MUST EMPLOYMENT BE CONTINUOUS?—In *Appleby* v. *Horseley Co., Ltd., and Lovat* ([1899] 2 Q.B. 521; 80 L.T.R. 853; 15 T.L.R. 410) a workman had been in the employ of the Horseley Co. as a rivetter at £2, 10s. a week from September 27th 1895 to March 16th 1896, when he met with an accident which caused him to remain away from work for eleven months, though he was not dismissed from the service of his employers. In February 1897 he went back to work, not as a rivetter, but in a different capacity, with wages at £1, 10s. a week, and remained at work on these terms till September 27th 1898, when he met with an accident which caused his death. The County Court Judge held that during the eleven months there had been a break in the employment, and that

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Sched. I. (1.) (*a*) (i).

the workman had not therefore been 'in the employment of the same employer during the three years next preceding the injury.' He held, however, that the words '156 times his average weekly earnings during the period of his actual employment under the said employer' meant all the periods of employment, during the three years, under the same employer, relying upon the provisions of the Interpretation Act, 1889,[1] that the singular number shall include the plural. Therefore, in ascertaining the average weekly earnings of the deceased, he took into account the wages earned during both periods of employment, and awarded as compensation the sum of £269, 5s. If only the last period of employment had been taken into account, the amount of compensation would have been £234.

The Court of Appeal held that, for the purpose of calculating the compensation payable under Schedule I. (1) (*a*) (i), the period of the workman's employment by the respondents had been less than three years, and that his average weekly earnings must be calculated only with reference to the last period of his employment, there having been a break in the employment for eleven months. 'My opinion,' said Smith L.J., 'is that throughout Schedule I. "employment" should be read as meaning "continuous employment."' He also expressed the opinion that the County Court Judge was wrong in reading the word 'period' as 'periods.'

In a later case it was held by the Court of Appeal that, though the employment must be continuous, it was not necessary that the workman should have been employed every day of every week of the period (*Hathaway* v. *Argus Printing Co.* [1901] 1 K.B. 96; 83 L.T.R. 465; 17 T.L.R. 42).

But now, owing to the decision in *Lysons* v. *Knowles* (see p. 175), not only does continuous employment come within the Act, but also intermittent employment, as in the case of casual labourers employed by the day or the hour. In such cases the 'average weekly earnings' are found by dividing the total amount earned by the workman by the number of weeks over which his employment extended, even though he might have been employed only one day or half a day a week.

[1] 52 and 53 Vict. c. 63.

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For further cases on this subject see notes under Schedule I. (1) (*b*), at p. 185. **Sched. I. (1.) (*a*) (i).**

DEDUCTIONS.—'The amount of any weekly payments made under this Act shall be deducted from such sum.' It will be observed that the only deduction mentioned is that of 'any weekly payments made under this Act.' It apparently would not include any lump sum paid to the workman before the expiration of six months from the time of the accident, because such sum is not compensation paid under the Act. The workman is entitled to compensation by a weekly payment as provided by this Schedule. Such weekly payment cannot be redeemed by the payment of a lump sum until after it has been continued for a period of six months (Schedule I. (13)). Hence any lump sum paid before the expiration of that time would be a gratuitous payment, and not 'a payment made under this Act.' See notes under Sec. 1 (3), at p. 32.

CLAIM BY DEPENDANTS ON DEATH OF WORKMAN WHO HAD PREVIOUSLY OBTAINED AN AWARD.—From the insertion of the words in Schedule I. (1) (*a*) (i) about deducting weekly payments from the sum awarded to dependants, it is clear that there is nothing to prevent dependants from claiming under the Act, even though the workman had already been paid compensation under Schedule I. (1) (*b*). Such cases may often happen. A workman who has received weekly payments by way of compensation under Schedule I. (1) (*b*), may shortly afterwards die from the injuries he sustained. Under such circumstances the dependants can still claim under Schedule I. (1) (*a*), but the amount paid in weekly payments will be deducted from the sum awarded to them.

II.—DEPENDANTS IN PART DEPENDENT.

Sched. I. (1.) (*a*) (ii).

When the deceased leaves dependants wholly dependent and compensation is paid under Schedule I. (1) (*a*) (i), the employer will not have to make further payments under Schedule I. (1) (*a*) (ii) or (iii). But if there are no such dependants, those who are partially dependent can obtain compensation under Schedule I. (1) (*a*) (ii). The amount, in case of partial

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Sched. I. (1.) (a) (ii).

dependency, is not so easily arrived at as when there are dependants wholly dependent. It may be settled by agreement or by arbitration, and it is to be a sum 'reasonable and proportionate to the injury to the dependants,' but in no case must it exceed £300. It may be any sum up to that amount, and the question as to what is 'reasonable and proportionate to the injury' is one of fact for the Arbitrator to determine.

WHERE THERE ARE SEVERAL DEPENDANTS.—However many dependants there are, the total sum awarded must not exceed £300. The sum awarded may be distributed among many dependants, and in default of the dependants agreeing among themselves as to the amount to be paid to each of them, the question must be settled by arbitration (Schedule I. (5)).

WHERE SOME DEPENDANTS ARE WHOLLY AND OTHERS PARTIALLY DEPENDENT.—Though, when a deceased workman leaves dependants wholly dependent and compensation is paid under Schedule I. (1) (*a*) (i), the employer has nothing further to pay under Schedule I. (1) (*a*) (ii) or (iii), there appears to be nothing in the Act to prevent those who are partially dependent from sharing in the amount awarded under Schedule I. (1) (*a*) (i). See further on this question note under Sec. 7 (2), at p. 158.

Sched. I. (1.) (a) (iii).

III.—NO DEPENDANTS.

Schedule I. (1) (*a*) (iii) only comes into force when there are no dependants left at all. In that case compensation is payable to the person or persons who incurred the expenses of the deceased workman's medical attendance and burial, but the amount is not to exceed £10. If the amount awarded is insufficient for the payment of such expenses in full, it will be apportioned between the persons to whom the expenses are due.

Sched. I. (1.) (b).

(*b*) Where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding fifty per cent. of his average

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weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound. Sched. I. (1.) (b).

AMOUNT OF COMPENSATION WHEN TOTAL OR PARTIAL INCAPACITY RESULTS FROM INJURY.—This is stated to be 'a weekly payment . . . not exceeding fifty per cent. of his average weekly earnings . . . such weekly payment not to exceed one pound.' It will thus be seen that the only limit fixed is, that the weekly payment is not to exceed half the workman's average weekly earnings, and is in no case to be more than £1. There is nothing to compel the Arbitrator to award the full amount in the event of total incapacity, nor is there anything to prevent him from awarding the full amount in the event of partial incapacity, however slight the injury may be. The amount is left entirely at his discretion provided he keeps within the limits stated. But under Schedule I. (2), in fixing the amount, he is to have regard to the difference between what the workman earned before the accident and what he is able to earn afterwards, and to any payment which he has received from his employer during incapacity (see note under Schedule I. (2), at p. 188). Apart, however, from this direction, it is open to the Arbitrator to award any weekly sum within the prescribed limits, whatever the nature of the injury may be, and whether the incapacity be total or partial.

DISEASE ACCELERATED BY ACCIDENT.—Where an injury (*e.g.* a disease) is not caused by, but only accelerated by, an accident, it is possible to compensate the workman fully for the injury received through the accident, by making a terminable award. Thus, in *Ward* v. *London and North-Western Railway Co.* (111 Law Times 209) the applicant met with an accident by which he injured his knee, and he also alleged that the shock of the accident had produced the disease of the eye known as 'glaucoma.' He had been paid compensation with regard to the injury to the knee, and it was contended on

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Sched. I. (1.) (b).

behalf of the respondents that the shock of the accident did not produce but only accelerated the progress of the disease of the eye, as such disease existed prior to the accident; that under these circumstances the judge had power to make a terminable award, and to limit the weekly payments to the period of incapacity attributable to the acceleration of the disease. The judge accepted this contention, holding that though the accident did not produce glaucoma, yet the disease had been accelerated by the accident, and had thus produced incapacity from blindness which would not in the ordinary course have ensued for a period of two years. He therefore ordered the respondents to make the weekly payment during the period of incapacity attributable to the accident—viz. during the two years—such weekly payment to cease after the expiration of that time.

A WEEKLY PAYMENT.—In case of total or partial incapacity a weekly payment has to be made as compensation, and this weekly payment must be continued for at least six months, provided the incapacity is of that duration (Schedule I. (13)), when it can be redeemed under Schedule I. (13) by the payment of a lump sum.

There appears, however, to be nothing in the Act to prevent an employer and workman coming to an agreement, under which the workman accepts a lump sum in full satisfaction of his claim, whether he has received any weekly payments under the Act or not. Such an agreement will debar the workman from afterwards proceeding to arbitration owing to the provisions of Sec. 1 (3) (see p. 30). But as to whether it will in any way bind his dependants, see notes at p. 32.

A form of such an agreement will be found in Appendix G at p. 329.

AFTER THE SECOND WEEK.—Compensation is not to be payable in any case for two weeks—that is, for any injury which does not incapacitate the workman for more than two weeks. But the words do not necessarily mean after the second week from the time of the injury. On the other hand, they probably mean after the second week of incapacity. A workman might meet with an injury which did not incapacitate him for the two succeeding weeks, but which eventually incapacitated him for months. He might be able

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to return to work for a fortnight after the injury and then find that he is unable to continue it. In such a case it is submitted that the two weeks would be calculated, not from the time of the injury, but from the time when he had to finally abandon his work. Sec. 1 (2) (*a*) says that an 'employer shall not be liable in respect of any injury which does not disable the workman for a period of at least two weeks from earning full wages.' If the two weeks were to be calculated from the day of the injury, then, in the case given above, the workman would not have been disabled for a period of two weeks from earning full wages, as he would have earned full wages for a fortnight after the injury. Consequently it is thought that the two weeks refer to the first two consecutive weeks during which the workman is prevented from earning full wages. See note under Sec. 1 (2) (*a*), at p. 17.

Sched. I. (1.) (*b*).

AVERAGE WEEKLY EARNINGS.—Owing to the use of these words a difficulty soon arose as to whether the 'average weekly earnings' could be ascertained where the employment had been for less than two weeks. Strictly the word 'average' implies the idea of plurality, but if, to ascertain an average, a workman had to be employed for at least two weeks, a large body of workmen would be altogether deprived of the benefits of the Act. Most casual labourers and piece workers, who work for different employers day by day, would be outside the provisions of the Act. They would only come within it when they happened to have been employed by the same employer for two weeks, and immediately they left that employer they would be outside it again until they had completed a continuous employment of two weeks with another employer. Consequently if employers of casual labourers took care never to employ the same labourer continuously for two weeks together, they could rid themselves of all responsibility under the Act.

LYSONS v. ANDREW KNOWLES AND SONS, LTD. — This question came before the Courts in *Lysons* v. *Andrew Knowles and Sons, Ltd.* [1900] 1 Q.B. 780; 82 L.T.R. 189; 16 T.L.R. 250; House of Lords [1901] A.C. 79; 84 L.T.R. 65; 17 T.L.R. 156).

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Sched. I (1.) (b).

The applicant, a miner, was employed by the respondents, a colliery company, by the day, at the daily wage of 6s. He commenced to work for the respondents on Tuesday, July 18th 1899, when he went down into the pit and did a day's work. The Wednesday being a holiday, the mine was closed, but the applicant went down the mine on the Thursday to do a day's work, and was injured by the fall of a piece of coal. The County Court Judge of Salford held that, as the applicant had in fact earned 12s. in one week or period of seven days, that sum must be taken to be his 'average weekly earnings' for the purpose of assessing compensation, and he therefore awarded him 6s. a week.

LYSONS v. ANDREW KNOWLES AND SONS, LTD., BEFORE THE COURT OF APPEAL.—An appeal to the Court of Appeal was allowed, on the ground that, in order to obtain the benefit of the Act, a workman must have been for at least two weeks in the employment of the employer in whose service he sustained the injury for which he seeks compensation. Speaking of the phrase 'average weekly earnings,' Smith L.J. said :—'To what conclusion ought this language to lead us? To the conclusion that the Act embraces men who undertake work within the purview of the Act, and who work for a day only, or to the conclusion that it is confined to men who work for such a time that their weekly earnings can be averaged? The former conclusion would cut the word "average" altogether out of the Schedule; but this cannot be done, for the word is unambiguous, and was undoubtedly put into the Schedule by the Legislature for some reason. Is not this Court, then, necessarily driven to say that, in order to come within the Act, a man must have been in his employment for at least two weeks at the date of the accident? Unless we say that, I cannot see how an average of the weekly earnings can be taken.'

This decision was unsatisfactory, as it excluded from the benefits of the Act all casual labourers—that is to say, all labourers who are employed by the day or the hour, and who at the time of the accident have not been in the employment of the same employer for two weeks. Such a result, moreover, was not contemplated by the Legislature, as appears from a correspondence between the Secretary of the National Union

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of Dock Labourers and the Right Honourable J. Chamberlain, M.P., which is reproduced in 108 Law Times, p. 97. The correspondence was in reference to the case of *Williams* v. *Poulson* (16 T.L.R. 42), in which the Court of Appeal, though not definitely deciding that a workman must be employed by the same employer at least two weeks to obtain the benefits of the Act, expressed an opinion to the effect that men casually employed and not in the receipt of regular weekly wages were not within the meaning of the Act. On his attention being called to this case, the following reply was sent by Mr. Chamberlain's Private Secretary:—'I am directed by Mr. Chamberlain to acknowledge the receipt of your letter, and to say that of course he is not able to give a legal opinion, but that when the Act was passed he certainly had no idea that piece-workers or casual labourers, if engaged in *bonâ-fide* employment, could or would be excluded from the benefits of the measure.'

Sched. I. (1.) (b).

With the hope that some way would be found out of the difficulty, or if not, that the Legislature would properly amend the wording of Schedule I. (1) so as to include those workmen who by this decision were excluded from the Act, an appeal was taken to the House of Lords.

LYSONS v. ANDREW KNOWLES AND SONS, LTD., IN THE HOUSE OF LORDS.—The decision of the Court of Appeal was unanimously reversed by the House of Lords, who said that the word 'average' in the expression 'average weekly earnings' was used loosely and inaccurately, and that the right to compensation given by Sec. 1 of the Act was not restricted by Schedule I. (1) to employments by the week, or for weekly wages, or for two weeks at least, but that *employment by the day, for one or more days, was within the Act.* Great stress was laid upon the fact that the *right* to compensation was given by Sec. 1 of the Act, and that what followed in Schedule I. (1) was not a repealing of the right which was first granted, but was a statement as to the mode in which that compensation was to be ascertained and determined. 'I do not,' said the Lord Chancellor, 'look upon the provision made in respect of compensation as one which, either in language or in the intention of the Legislature, was meant to cut down and override the primary right given to every work-

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Sched. I. (1.) (b).

man to compensation, but I regard it as a mode of ascertaining what the quantum was to be. . . . It seems to me that the Legislature, in using the phrase that you must take the average of the earnings for the week, did not in the least mean to limit and cut down the right of the disabled labourer to have his compensation, so that if you had a difficulty in the arithmetic he was not to get it at all; but it provided an artificial means of finding out what that quantum was to be, and that was no doubt by the use of the word "average."' Lord Macnaghten, in the course of his judgment, said:—'The word "average" is used very loosely in the Schedule. The obvious meaning I think is, that you are to take a week's earnings as the unit of calculation; but if there has been a series of weekly earnings of different amounts, you are to take an average, and the unit will then be not an actual week's earnings, but a hypothetical week's earnings. You are to take one week with another.'

WHAT IS A WEEK?—As to what constitutes a week for the purpose of arriving at the 'average weekly earnings,' the following views may be taken:—

(*a*) A calendar week, *i.e.* a week commencing on Sunday morning and ending on Saturday night.

(*b*) Any period of seven consecutive days, a view adopted by the County Court Judge in *Lysons* v. *Knowles* (*supra*).

(*c*) A week so called from the custom of a particular trade, viz., a period of seven days ending on the day on which the wages are paid, a view rejected by the County Court Judge in *Lysons* v. *Knowles* (*supra*).

Of these three, it is submitted that the first one should in all cases be adopted, and that 'weekly' should be interpreted as meaning 'by the calendar week.' This was the view taken by the Court of Session in *Cadzow Coal Co., Ltd.* v. *Gaffney* (38 S.L.R. 40), where Lord Trayner said:—'It was also suggested that, as in some employments the working week may begin, say, on a Tuesday and end on the following Monday, we should regard "week" in the statute as if it were six full days. I do not think so. The statute is not dealing with special employments, but with the general question; and when it speaks of week, I regard it as meaning the space of time which commences on Sunday and ends on Saturday.' See also *Nelson* v. *Kerr and Mitchell* (38 S.L.R. 645).

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The amended order of the House of Lords in *Lysons* v. *Knowles* (*supra*), in which the award of 24s. was reduced to 12s., certainly suggests that the House considered that Lysons, who worked on a Tuesday and the following Thursday, had worked during portions of two weeks, as the colliery books were made up on a Tuesday night. But the point was not referred to in the judgments, and it is submitted that the reduction in the award found its way into the order by mistake, as if Lysons was to have been regarded as having worked portions of two weeks, the appeal to the House of Lords would have been unnecessary, as his 'average weekly earnings' could easily have been found. The point expressly decided, namely, that a man, to come within the Act, need not be employed for two weeks, shows clearly that the House in that case regarded the employment as being for one week only.

Sched. I. (1.) (b).

It may be pointed out that in Sec. 98 of the Factory and Workshop Act, 1878,[1] it is enacted that 'the expression "week" means the period between midnight on Saturday night, and midnight on the succeeding Saturday night.'

AVERAGE WEEKLY EARNINGS: HOW CALCULATED.—Where a workman has been employed continuously for a period of twelve months, his average weekly earnings during that period are easily found. But where there has been a break in the employment, or where, though the employment has been substantially continuous, the workman has been absent from his work for short periods, a difficulty arises. There have been several cases on these points before the Courts, and as a result of them the following three rules may be laid down :—

(1) Where a workman has been employed by the same employer for twelve months, the method of obtaining his average weekly earnings is to add up the total sum earned during that time and divide by 52, without having regard to any number of days or weeks when the man was not actually at work.

(2) To bring a case within the words 'during the previous twelve months,' there must be a continuous employment—that is, a continuous relationship of master and servant during that time.

(3) To satisfy the words 'for any less period during which

[1] 41 and 42 Vict. c. 16.

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Sched. I. (1.) (b).

he has been in the employment of the same employer,' there must be a substantial continuous employment during that period.

The meaning and importance of these rules will be better understood by considering each separately, and by an examination of the cases that bear upon them.

FIRST RULE:—Where a workman has been employed by the same employer for twelve months, the method of obtaining his average weekly earnings is to add up the total sum earned during that time and divide by 52, without having regard to any number of days or weeks when the man was not actually at work.—This rule was in effect laid down by the Court of Appeal in *Keast* v. *Barrow Hematite Steel Co.* (15 T.L.R. 141). The right to compensation for incapacity was admitted, the only question before the Court being on what basis it should be calculated. The applicant had been in the employment of the respondents for sixteen years, but during the twelve months before the accident he had not been actually at work for the whole period; he had been twice away for a week or more, and twice for a shorter period, for purposes of his own. It was contended for the applicant that those weeks and days during which he had not been actually at work ought to be excluded, and that his 'average weekly earnings' would be found by dividing the total earnings during the year by the number of weeks he had been actually at work. The County Court Judge accepted this contention; but, on appeal, the Court of Appeal held that, as the employment of the applicant during the twelve months had been continuous, the total amount of his earnings during the year must be divided by 52; and, in the words of Smith L.J., the rule was laid down—'That the total amount of the year's earnings ought to be divided by 52 and not by any less number, excluding the weeks when the man was not at work.' See also *Williams* v. *Poulson* (16 T.L.R. 42); *Small* v. *M'Cormick and Ewing* (36 S.L.R. 700).

SECOND RULE:—To bring a case within the words 'during the previous twelve months,' there must be a continuous employment; that is, a continuous relationship of master and servant during that time.—This rule was laid down in *Jones* v. *Ocean Coal Co., Ltd.* ([1899] 2 Q.B. 124; 80 L.T.R. 582;

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15 T.L.R. 339). A workman had been in the employ of the respondents from October 3, 1897, to March 31, 1898, under an agreement fixing the rate of wages dated January 1, 1892. This agreement was terminated by a six months' notice given by the workmen under a clause in the agreement to that effect, the individual contracts between the employers and the workmen being terminated by a notice given by the employers under another clause of the agreement; this notice expired on March 31, 1898. From this date the men, including the applicant, ceased to work, as a strike commenced on April 1, 1898, and lasted until September 5, 1898. On September 12, 1898, the applicant resumed work under a new contract, differing in its terms from the old contract, and on October 3, 1898, he was injured by an accident.

Sched. I. (1.) (*b*).

It was contended on behalf of the applicant that, under Schedule I. (1) (*b*), his average weekly earnings were his earnings for the period between September 12, 1898, and the date of the accident; the respondents contended that the earnings for the twelve months before the accident should be taken and divided by the number of weeks during which the applicant was actually at work, the strike period being excluded, and the County Court Judge decided in favour of the respondents' contention.

It was held by the Court of Appeal that the period of employment contemplated by Schedule I. (1) (*b*) was a substantially continuous employment, during which the relation of master and servant substantially existed between the employer and workman, and that therefore, in ascertaining the workman's average weekly earnings, regard could only be had to the period of employment between the end of the strike and the date of the accident, the employment before the strike having been duly determined by the act of the parties.

Much stress was laid upon the word 'substantially,' and Williams and Romer L.JJ. agreed that the real question was whether the relationship of master and servant existed during the whole period under consideration, or whether there had been any break in that relationship. The test is, are the facts such that it can be assumed that the workman, if called upon to

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Sched. I. (1.) (b)

work, will do so, or that the employer, if asked to give employment, will allow the man to work? If there is a period during which that can not be truly assumed, then the relationship of master and servant has come to an end. If work were so slack that the master could only give the workman three days' work in the week, or if there were holidays, as in *Keast* v. *Barrow Hematite Steel Co.* (*supra*), it would still be true to say that the relationship of master and servant existed during the whole period, and that therefore the employment continued during the whole period.

Whether the employment is to be regarded as being continuous, or whether there has been a break in the employment, is a question of fact for the Arbitrator to determine, and his finding will not be disturbed if there was any evidence to support it. In *Hewlett* v. *Hepburn and Co.* (16 T.L.R. 56) the applicant was a carpenter in the employment of the respondents. He was first employed on August 24, 1897, and remained at work with the respondents until February 17, 1898, being paid by the hour. From February 17 to May 12, 1898, he was absent through illness, and on the latter date he came back to work, and remained at work until August 18, when he was again absent from ill-health until September 3, 1898. He then came back and remained at work until February 6, 1899, when he met with an accident which caused an injury for which he claimed compensation. The question was, whether the employment was continuous, notwithstanding the periods of absence, in which case the compensation payable would be 12s. 9d. a week, or whether the employment was determined when the applicant was absent through illness, in which case the period of employment to be considered would be from September 3, 1898, to February 6, 1899, when the weekly compensation would be 17s. 9d. The County Court Judge found that the employment came to an end on August 18, 1898, and that a fresh employment commenced on September 3, 1898, and he accordingly assessed the compensation at 17s. 9d. a week.

The Court of Appeal said that the only question was whether there had in fact been a break in the employment, and as the County Court Judge had found that there had

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been a break, the appeal failed, as there clearly was evidence on which he could so find, though, as pointed out by Smith L.J., no doubt there was evidence the other way also. Sched. I. (1.) (b).

In *Appleby* v. *Horseley Co., Ltd.* ([1899] 2 Q.B. 521; 80 L.T.R. 853; 15 T.L.R. 410) it was held that the conclusion arrived at in *Jones* v. *Ocean Coal Co., Ltd.* (*supra*), that 'employment' means 'continuous employment' in Schedule I. (1) (*b*), which relates to compensation for incapacity resulting from injury, also holds good under Schedule I. (1) (*a*) (i), which deals with compensation in case of death. For the facts of this case see note under Schedule I. (1) (*a*) (i), at p. 169.

THIRD RULE:—To satisfy the words 'for any less period during which he has been in the employment of the same employer' there must be a substantial continuous employment during that period.—This rule is taken from the decision of the Court of Appeal in *Jones* v. *Ocean Coal Co., Ltd.* (*supra*), when it was laid down that the period of employment mentioned in Schedule I. (1) (*b*), whether for twelve months or any less period, must be substantially continuous. That is to say, if the Arbitrator finds that there has been a break in the employment, during which the relationship of master and servant did not exist, then, in assessing the compensation, he can only have regard to the wages earned during the last period of the employment, and cannot take into consideration those earned before the break in the employment.

Smith L.J. said:—'Schedule I. (1) (*b*) says in the first part, "where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed"; stopping there, I think that there must be a continuous employment during the twelve months to bring a workman within that provision: that is, a continuous relationship of master and servant. Then the clause proceeds, "but if not, then for any less period during which he has been in the employment of the same employer"; and I think that to satisfy that limit of the clause the employment must also be continuous.'

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Sched. I. (1.) (b).

But though the employment 'for any less period' must be continuous, a workman need not be employed for every day of that period. Employment for two nights a week for several weeks may be 'a continuous employment.' Thus in *Hathaway* v. *Argus Printing Company* ([1901] 1 K.B. 96; 83 L.T.R. 465; 17 T.L.R. 42), a workman was under an agreement to work for his employers on two specified nights in every week at a fixed rate of wages for each night. During the rest of the week he was free to work as he liked, and he sometimes worked for the same employers, and at other times for other firms. In the third week of his employment he met with an accident for which he claimed compensation. The County Court Judge based his award on the aggregate wages for the two nights a week on which the applicant worked under the agreement, and left out of consideration his other earnings. The applicant appealed on the ground that his other earnings ought to be taken into consideration.

The Court of Appeal held that the employment, so far as the workman agreed to work on the two specified nights in each week, was a continuous one, and that, in computing his 'average weekly earnings,' the wages he earned on those two nights should be taken into account, but not the sums he earned from other masters, nor the sums he earned for casual work done for the same employers.

As to the claim based on work done for other employers, it is clearly not within the Act, but Stirling L.J. doubted whether the earnings of the applicant paid to him by the same employer, but in respect of work done on other days of the week than those covered by the agreement, could not be brought in to swell the average weekly earnings. The case was decided before *Lysons* v. *Knowles* (see p. 177) reached the House of Lords, and the ground of the decision appears to have been that the casual work he did for his employers did not constitute a continuous employment. But owing to the decision in *Lysons* v. *Knowles*, it is submitted that this judgment would no longer stand. By that case casual labourers are brought within the Act, and being within it, the fact that a man is employed regularly for certain portions of the week ought not to deprive him of the benefit of any earnings received from the same employer at casual jobs.

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When the employment has been for a less period than twelve months, the average weekly earnings are found by dividing the total earnings during the continuous employment by the number of weeks over which such employment is spread, without having any regard to days or weeks when the workman was not actually at work. That is to say, the rule laid down in *Keast* v. *Barrow Hematite Steel Co.* (p. 180 *ante*) is followed when the employment has been for a less period than twelve months (*Williams* v. *Poulson*, 16 T.L.R. 42; *Small* v. *M'Cormick and Ewing*, 36 S.L.R. 700). **Sched. I. (1.) (b).**

QUALIFICATION OF THIRD RULE.—The Third Rule as laid down above needs qualification owing to the decision in *Lysons* v. *Knowles* (p. 177 *ante*). As a means of assessing compensation where there have been two periods of continuous employment, with a break between, it will still stand. That is to say, in computing the compensation the only period of employment to be taken into account is the last continued period before the occurrence of the accident. But continuous employment itself is no longer a condition to the obtaining of compensation, as employment by the hour or by the day of casual labourers comes within the Act. The average weekly earnings of casual labourers so employed is found by dividing the amount actually earned by them, by the number of weeks in which they have had employment under the same employer.

AVERAGE WEEKLY EARNINGS WHEN EMPLOYMENT FOR LESS THAN TWO FULL WEEKS.—The only sums to be taken into account in arriving at the 'average weekly earnings' are the sums actually earned. Thus, if a man is injured on the first day of his employment, only the earnings of that particular day can be regarded, and not the hypothetical sum which, if he had continued to work for six days, he might have earned.

Thus in *Cadzow Coal Co., Ltd.* v. *Gaffney* (38 S.L.R. 40) a miner, who entered the service of his employers on the Friday of the week preceding the accident and did not work on Saturday, but worked from Monday to Thursday of the following week, was held to have been in the employment for parts of two weeks, and his 'average weekly earnings' were therefore found by dividing the sum actually earned by two. 'It is not wages to which the injured person would be entitled

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Sched. I. (1.) (b).

if he worked for two full weeks that we are to take as the basis of compensation,' said Lord Justice Clerk, 'but earnings which he did in fact earn. If he worked for a short time only in one week and in consequence earned little for that week, then he must suffer.'

In *Nelson* v. *Kerr and Mitchell* (38 S.L.R. 645) where a miner worked three days in one week earning 16s. 2d., and also returned to work on the Monday following but earned no wages, as he was injured before he put out any coal, it was held that his average weekly earnings were 16s. 2d., as, though he was employed for part of a second week, he only earned wages for one week, which wages therefore became his 'average weekly earnings.'

See also *Peers* v. *Astley and Tyldesley Collieries Co., Ltd.* (110 Law Times 548), but compare with it *Greaves* v. *Mulliners, Ltd.* (111 Law Times 183).

WHERE THERE IS A WEEKLY HIRING.—In many employments workmen are engaged by the week, and a week's notice is necessary to terminate the contract of service. This condition is frequently part of the contract, but even when the contract is silent on the point, the fact that wages are paid weekly is strongly in favour of the view that the hiring is for a week. If, then, a workman is so engaged and meets with an accident during the first week which prevents him from attending to his work, his employer will still in law be bound to pay him at least two weeks' wages, as temporary sickness or incapacity does not terminate the contract of service. To terminate that contract, the workman must be dismissed; and as his hiring is a weekly one, he cannot be dismissed except by notice terminating at the end of the second week. The workman is therefore entitled to two weeks' wages, even though he may have worked only for a few days; and it is submitted that, under such circumstances, his 'average weekly earnings' will be the weekly wage at which he was engaged.

Cuckson v. *Stones* (E. and E. 248; 28 L.J.Q.B. 25) is an authority that temporary sickness does not terminate a contract of service; and while a contract of service remains in force, the workman, even if ill, is entitled to his wages. In that case the plaintiff had agreed to serve the defendant as a

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brewer for ten years at £2, 10s. a week. The plaintiff was taken ill at Christmas 1857, and was unable to attend to his work for thirteen weeks, at the expiration of which period he tendered his services and was again employed about the brewery. In an action for wages for the thirteen weeks during which he had been absent, it was admitted that the contract of service had not been rescinded. 'Looking to the nature of the contract sued upon in this action,' said Campbell C.J., 'we think that want of ability to serve for a week would not of necessity be an answer to a claim for a week's wages, if in truth the plaintiff was ready and willing to serve had he been able to do so, and was only prevented from serving during the week by the visitation of God, the contract of service never having been determined.'

Sched. I. (1.) (b).

IF HE HAS BEEN SO LONG EMPLOYED.—The words 'if he has been so long employed' refer to employment by the same employer and not to employment of the same kind or in the same work. In *Price* v. *Marsden* ([1899] 1 Q.B. 493; 80 L.T.R. 15; 15 T.L.R. 184) a workman had been in the employment of the respondents as a factory hand for three years. Up to September 9, 1898, he was a little piecer, earning 9s. 6d. a week. On that day he was promoted to be a side piecer, at 13s. 8d. a week. The accident happened on September 28th, and the only question was as to the amount of compensation to which he was entitled. It was contended for the workman that the words 'if he has been so long employed' ought to be construed as meaning 'if he has been so long employed in the same kind of employment'; and that, as the workman entered into a new kind of employment on September 9th, the award ought to be for the weekly payment of half the wages he had commenced to earn under this new employment. This contention was not accepted by the Court of Appeal, and it was held that the proper way to arrive at the compensation was to take the whole of the wages earned during the year and divide the total by fifty-two. 'The words "if he has been so long employed,"' said Smith L.J., 'mean "if he has been so long employed by the same employer," and not "if he has been so long employed in the same grade of employment."'

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Sched. I. (2.)

(2.) In fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident, and the average amount which he is able to earn after the accident, and to any payment not being wages which he may receive from the employer in respect of his injury during the period of his incapacity.

The sole test of the right of a workman to a weekly payment under Schedule I. (1) (*b*), in respect of partial incapacity for work, is his wage-earning capacity after the accident which caused the injury for which compensation is sought. Therefore regard is to be had to the difference between the earnings before and after the accident. If there is no difference between the earnings before and those after the accident, the workman is not entitled to compensation, as regard cannot be had to what the workman might have been earning had he not met with any injury at all (*Pomphrey* v. *Southwark Press* [1901] 1 K.B. 86; 83 L.T.R. 468; 17 T.L.R. 53. But see *Freeland* v. *Macfarlane, Lang and Co.* (37 S.L.R. 599), where a contrary decision was come to by the Court of Session). If there is a difference, in fixing the amount of weekly payment regard is to be had to the extent to which the wage-earning capacity is reduced.

It must be noticed that the word used is 'earnings' and not 'wages.' For the difference between the meanings of these words, see note under Sec. 1 (2) (*a*), at p. 18.

COMPENSATION WHEN WORKMAN TAKEN BACK AT SAME WAGES.—The words 'regard shall be had to' are elastic, and not only must regard be had to the difference between the amount of the average weekly earnings before the accident, and at the time of the arbitration, but in fixing the amount of the weekly payment, one must look at the future possibilities and what the result of the injury might eventually be.

This point came before the Court of Appeal in *Irons* v. *Davis and Timmins, Ltd.* ([1899] 2 Q.B. 333; 80 L.T.R. 673), and *Chandler* v. *Smith* ([1899] 2 Q.B. 506; 81 L.T.R. 317; 15

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T.L.R. 480). From the decisions in these cases, it will be seen that where a workman is taken back in the employ and paid the same wages as he received before the accident, though in fact he is prevented from doing a substantial part of the work which at the time of the accident he was employed to do, and consequently his wage-earning power in any other undertaking where he might seek employment is materially decreased, there are two courses open to an Arbitrator, namely— Sched. I. (2.)

(1) To make an award for the weekly payment of a nominal sum, so as to preserve to the workman his right to avail himself of the provision in Schedule I. (12); or

(2) To make a declaration of the liability of the employer, and register it in the County Court, leaving the amount of compensation to be fixed upon an application under Schedule I. (12).

AWARD OF NOMINAL SUM.—In *Irons* v. *Davis and Timmins, Ltd.* (*supra*), a lad of seventeen years of age received an injury, which resulted in the amputation of the top joint of his thumb, and was absent from his employment for eight weeks after the accident. At the end of that time he was taken back by his employers at the same rate of wages, but was not put to the same class of work as before the accident. The County Court Judge awarded him half his average weekly earnings for six weeks, and as to this there was no dispute. He also awarded him a further sum of 2s. 6d. a week for life, and from this part of the award the employers appealed.

At the hearing before the Court of Appeal, Counsel for the appellants assented to the suggestion of the Court that the applicant should be awarded a nominal sum, so as to preserve to him his right to avail himself of the provision under Schedule I. (12), by which a weekly payment once awarded may be reviewed at the request of either party. Consequently the amount of weekly payment was reduced to 1d., A. L. Smith L.J. observing that it was therefore understood, that if in the future the ability of the respondent to earn wages was affected by the accident, the County Court Judge would have power under Schedule I. (12) to review the award and to increase the amount of weekly payment.

In this case it was argued that the incapacity for work in respect of which compensation is payable under Schedule I.

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Sched. I. (2.)

(1) (*b*) must be an incapacity for that class of work which the workman was doing at the time of the accident. This argument was based on Sec. 1 (2) (*a*), which provides that an employer shall not be liable in respect of an injury which does not disable the workman for a period of at least two weeks from earning full wages 'at the work at which he was employed.' The Court did not express an opinion, but in the later case of *Chandler* v. *Smith* (p. 188), they in effect adopted the principle.

DECLARATION OF LIABILITY OF EMPLOYER.—In *Chandler* v. *Smith* (p. 188), a workman was employed as foreman in a carpet-weaving factory; his principal duty was to supervise the hands, but he also, to the knowledge of his employer, used to set up and adjust the machines. Whilst doing so he received an injury necessitating the amputation of his thumb; he continued, however, to attend regularly to his work. He was incapacitated by the accident from setting up and adjusting the machines, and his work was afterwards confined to the supervision of the hands. His employer continued to pay him his wages at the same rate after as before the accident; but it was admitted that, should he leave his employer's service, his wage-earning power would be materially decreased.

It was held that, as the workman had been prevented by reason of the accident from doing a substantial part of the work at which he had previously earned his wages, he had been disabled for two weeks from earning full wages 'at the work at which he was employed,' within the meaning of Sec. 1 (2) (*a*).

It was further held that, as the workman had hitherto suffered no pecuniary loss, the proper course was to make a declaration of the liability of the employer, leaving the amount and duration of the compensation to be fixed upon an application under Schedule I. (12) to vary the award, should the workman at any future time be unable, by reason of the accident, to earn the same wages.

MAXIMUM AMOUNT OF COMPENSATION ALLOWED BY SCHEDULE I. (1) (*b*) NOT CUT DOWN BY SCHEDULE I. (2).—Schedule I. (2), which provides that in fixing the amount of a weekly payment regard is to be had to the difference between the average weekly earnings of the workman before the

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accident and the average amount which he is able to earn after the accident, does not operate so as necessarily to cut down the maximum rate of compensation allowed by Schedule I. (1) (*b*). Sched. I. (2)

This was decided in *Illingworth* v. *Walmsley* ([1900] 2 Q.B. 142; 82 L.T.R. 647; 16 T.L.R. 281). The applicant, who was employed by the respondent at an average weekly wage of £1, 13s. 8d., received serious injury to his hand while working at a circular saw. For a considerable time his employer paid him 16s. 10d. a week as compensation, being half his average weekly earnings, and eventually he resumed work at a weekly wage of 15s. The applicant then proceeded to arbitration, and the County Court Judge awarded him 15s. a week. On appeal, it was contended for the employer, that the effect of Schedule I. (1) (*b*) and Schedule I. (2) taken together was, that a workman who after an injury goes back to the same employer at reduced wages is only entitled to 50 per cent. of his loss; that in this case the applicant's loss was 18s. 8d. a week, being the difference between £1, 13s. 8d. which he earned before the accident, and 15s. which were his wages afterwards; and that therefore he was only entitled to compensation at the rate of 9s. 4d. a week.

The Court of Appeal did not accept this contention, and held that Schedule I. (2) does not operate necessarily to cut down the maximum compensation allowed by Schedule I. (1) (*b*); and Romer L.J. stated that there was no evidence that the County Court Judge did not have regard to the difference between the applicant's earnings before and after the accident.

This point was more fully considered in the Scotch case of *Geary* v. *William Dixon, Ltd.* (36 S.L.R. 640), when the following conclusions were arrived at:—(1) that under Schedule I. (2) an injured workman is not entitled as a matter of right to a weekly payment representing the whole of the difference between his average wage before and his average wage after the accident, such difference being merely one of the elements which the Arbitrator is to take into account in fixing the amount of compensation; (2) that such difference is not subject to the limitation of 50 per cent. imposed by Schedule I. (1) (*b*), and may therefore be competently awarded *in toto* by the Arbitrator as compensation.

Notwithstanding these decisions, it is submitted that, when

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Sched. I. (2.)

the workman, though partially incapacitated, is able to earn wages, the compensation awarded to him ought to be 50 per cent. of the difference between what he earned before the accident, and what he is earning, or capable of earning, at the time of the arbitration. By adopting this method of awarding compensation, half the loss falls upon the workman, and half upon the master. This is what the Legislature contemplated should happen in the case of total incapacity, and there appears to be no reason why the result should not be the same in the event of partial incapacity. This view is strengthened by a dictum of Collins L.J. in *Pomphrey* v. *The Southwark Press* ([1901] 1 K.B. 86; 83 L.T.R. 468; 17 T.L.R. 53). Though the point was not before the Court, in the course of his judgment he said:—'I take it to be clearly settled that the maximum amount which the injured workman can claim is to be measured by the difference between his earnings before the accident and what he can earn after it. *The maximum that can be awarded is one-half the difference so ascertained.*' It is as well, however, to point out that Collins L.J. was one of the Court that decided *Illingworth* v. *Walmsley* (*supra*).

ANY PAYMENT NOT BEING WAGES.—It will often happen that an employer, whilst denying liability under the Act, will pay sums of money to an injured workman during his incapacity out of feelings of compassion. In such cases, if his liability to pay compensation is afterwards established, such sums are to be taken into consideration in fixing the amount of the weekly payments.

In *Nelson* v. *Kerr and Mitchell* (38 S.L.R. 645) a miner was assisted by a boy, his son, who acted as his drawer, but who was paid nothing, though the usual wages for a boy so assisting a miner was 2s. 9d. a day. It was held that in calculating the average weekly earnings no reduction was to be made in respect of the work done by the miner's son.

In *Houghton* v. *Sutton Heath and Lea Green Collieries Company, Ltd.* ([1901] 1 K.B. 93; 83 L.T.R. 472; 17 T.L.R. 54) it was argued that, because 6d. a week was deducted from a miner's wages for lamp oil supplied by the employers, his wages were less by so much. The County Court Judge, however, took as the basis of his award the full weekly wages without regard to the weekly deduction therefrom, and the

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Court of Appeal held that the principle on which he had based his award was correct. Sched. I. (2.)

When a workman becomes entitled to be paid certain sums from a mutual aid fund to which he compulsorily contributed, the employers adding £100 a year to the workmen's subscriptions of £1400, should this amount be taken into consideration in awarding the compensation to which he is entitled under the Act? It is submitted that it should not, as the money the workman receives from the mutual aid fund, though 'not being wages,' is money to which he would have been absolutely entitled in case of sickness, etc. The Act creates a new liability on the part of the employer, and any payment a workman is entitled to apart from the Act cannot be taken into consideration, so as to relieve an employer from paying the full amount of compensation (*Backhouse* v. *Armstrong, Whitworth and Co.*, 106 Law Times 264).

As to taking into consideration a lump sum paid by the employer before six months have expired, see note on p. 171.

(3.) Where a workman has given notice of an accident, he shall, if so required by the employer, submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, and if he refuses to submit himself to such examination, or in any way obstructs the same, his right to compensation, and any proceeding under this Act in relation to compensation, shall be suspended until such examination takes place. Sched. I. (3.)

This clause is inserted to prevent fraudulent claims and cases of malingering. There is a similar provision in Schedule I. (11) for the medical examination of the workman whilst he is in receipt of weekly payments, except that under that clause the workman has to submit to examination if required either by the employer or by any person by whom the employer is entitled under this Act to be indemnified, whereas before he is in receipt of weekly payments, he is only bound

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Sched. I. (3.)

to submit to such examination if required to do so by the employer himself.

WHERE THE WORKMAN HAS GIVEN NOTICE.—It is not a condition precedent to the examination of a workman by a medical man that the workman should have given notice of the accident. Schedule I. (3) applies where no notice of the accident, as required by Sec. 2, has in fact been given, and the employers raise no objection to the workman's claim on that ground. That is to say, although the workman has not given notice of the accident, the employers are entitled, when he claims compensation, to require him to submit himself for medical examination in pursuance of Schedule I. (3). (*Osborn* v. *Vickers, Sons, and Maxim* [1900] 2 Q.B. 91; 82 L.T.R. 491; 16 T.L.R. 333.)

NO TERM CAN BE IMPOSED ON EMPLOYER AS A CONDITION OF THE WORKMAN'S BEING BOUND TO SUBMIT TO MEDICAL EXAMINATION.—In *Osborn* v. *Vickers, Sons, and Maxim* (*supra*), the Leeds County Court Judge ordered that a workman should submit himself for examination by a medical practitioner under Schedule I. (3), on condition that his employers would pay the fee of one guinea for the attendance at the examination of a medical practitioner on the workman's behalf. It was held, however, by the Court of Appeal that the County Court Judge had no jurisdiction to impose such a term upon the employers. 'Under the provisions of Schedule I. (3),' said Collins L.J., 'the appellants had a right to demand that the respondent should submit himself to the medical examination therein mentioned, and I do not think that the County Court Judge had any jurisdiction to impose upon the appellants such a condition as he did. I do not say that there might not be special circumstances in a case, rendering it so essential to the well-being of the person to be examined to have some medical man conversant with his constitution and state of health present at the examination, that it might be considered a necessary part of the examination that such a person should be present. Possibly such a case might arise. But in the present case there are no such special circumstances, and in my opinion, in imposing the condition which he did, the County Court Judge acted *ultra vires*.'

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PROCEDURE.—For the procedure when a workman refuses to submit himself for examination by a medical practitioner, or in any way obstructs such examination, see Rule 50 and Form 24 in Appendix B. Sched. I. (3.)

(4.) The payment shall, in case of death, be made to the legal personal representative of the workman, or, if he has no legal personal representative, to or for the benefit of his dependants, or, if he leaves no dependants, to the person to whom the expenses are due; and if made to the legal personal representative shall be paid by him to or for the benefit of the dependants or other person entitled thereto under this Act. Sched. I. (4.)

PAYMENT SHALL BE MADE TO THE LEGAL PERSONAL REPRESENTATIVE.—The legal personal representative is the executor or administrator; and, if there be one, this clause directs that the sum payable as compensation shall be paid to him, and 'shall be paid by him to or for the benefit of the dependants.' But he has not the power of deciding who are the dependants, or how much of the total sum received by him as compensation is to be paid to each dependant. By Schedule I. (5) any question as to who is a dependant or as to the amount payable to each dependant is, in default of agreement, to be settled by arbitration. The legal personal representative has therefore no discretionary power given to him by this clause. The money is paid to him as a trustee, and if the dependants cannot agree among themselves as to its distribution, he will be entitled to hold the money as trustee, until it has been settled by arbitration who are the dependants and what amount is to be paid to each.

MUST THE PAYMENT NECESSARILY BE MADE TO THE LEGAL PERSONAL REPRESENTATIVE?—From the wording of this clause, it would appear that, if there is a legal personal representative, the payment must be made to him. But this

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Sched. I. (4.)

clause must be read with those which follow it. In *Daniel* v. *Ocean Coal Co., Ltd.* (16 T.L.R. 368) the applicant was the widow of a workman who was killed whilst in the course of his employment. The applicant had taken out letters of administration to her deceased husband's estate, and had thereby become his legal personal representative. The County Court Judge by his award ordered that the Ocean Coal Co. should pay to the dependants of the deceased as compensation the sum of £246, 7s. 6d., and he ordered the said sum to be apportioned as follows:—£146, 7s. to or for the benefit of the widow, and £100 to or for the benefit of her two infant sons in equal shares. He further ordered that the sum of £146, 7s. apportioned to or for the benefit of the widow should be paid to her, and that the sum of £100 apportioned to or for the benefit of the sons should be invested by the registrar in his name in the Post Office Savings Bank for the benefit of the sons.

The applicant appealed from this award, and it was contended on her behalf that the County Court Judge had no power to make an order in these terms, but that, inasmuch as she was the legal personal representative of the deceased, he was bound, by Schedule I. (4), to order the whole of the compensation to be paid to her. The Court of Appeal dismissed the appeal, Smith L.J. observing that, reading Clauses 4, 5, 6 and 7 of Schedule I. together, he had no doubt that the County Court Judge had power to make the order which he had made.

WHERE NO LEGAL PERSONAL REPRESENTATIVE.—Where there is no legal personal representative of the deceased, the payment is to be made to or for the benefit of the dependants. The payment, of course, has to be made by the employer, but he, like the legal personal representative, has no power of deciding who are dependants, or how much ought to be paid to each. The employer therefore will be well advised not to pay compensation to any of the dependants, until it has been decided by arbitration how many dependants there are, and how much each is entitled to. Otherwise he might agree with certain dependants to pay a fixed sum, thinking that he was dealing with all the dependants of the deceased, and after he had paid

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it, other dependants, who were not parties to the agreement, might claim against him. If the employer does pay a sum to the dependants by agreement, he should have a memorandum of the agreement registered in the County Court under Schedule II. (8). See p. 225. A form of such an agreement will be found in Appendix G, at p. 330. **Sched. I. (4.)**

Where the amount payable by the employer has been agreed upon, and the only question remaining is as to who are dependants and how much each is to receive, if the employer is made a respondent, he can pay the amount into Court, when all further proceedings against him will be stayed (see Rule 5).

OTHER PERSON.—These words refer to the person who, where there are no dependants, becomes liable for the cost of medical attendance and burial.

For the bearing that the words in this clause have on the question as to who is to institute proceedings under the Act, see note under Sec. 7 (2), at p. 153.

(5.) Any question as to who is a dependant, or as to the amount payable to each dependant, shall, in default of agreement, be settled by arbitration under this Act. **Sched. I. (5.)**

Where compensation is payable to dependants, the questions as to who are dependants, and as to the amount payable to each dependant, are important ones, and the personal representative or the employer, as the case may be, will be well advised to have these matters settled by arbitration before paying over any sums. If settled by agreement, especially in the case of the employer, who will not know the members of the deceased's family, there is no guarantee that all the dependants have joined in the agreement. See note to last clause.

If there is no dispute as to the amount, the employer can pay the sum to the personal representative, and leave the dependants to settle the matter of the distribution among themselves. If the employer pays the agreed amount, he need not be made a respondent; but if he is made a respondent, he may pay the amount into the Court, and further proceedings against him will be stayed (Rule 5).

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Sched. I. (6.)

(6.) The sum allotted as compensation to a dependant may be invested or otherwise applied for the benefit of the person entitled thereto, as agreed, or as ordered by the committee or other arbitrator.

It will at once be seen that this is a most useful provision, as it enables an Arbitrator to protect the money awarded as compensation from being squandered uselessly. The Arbitrator will have to carefully consider each case on its merits before deciding whether to hand over the sum awarded in bulk to the dependants or to invest it for their benefit. There may be cases where it would be to the benefit of the dependant to receive the whole sum at once—*e.g.* if the dependant was in want of a little capital to set up a small business. On the other hand, in many cases it would be unwise to pay over the whole sum, as it might be immediately squandered. Where the dependants are infants it would be wise in all cases to order the money to be invested and repaid by instalments, until the infant arrives at an age when he or she can be expected to make a livelihood.

An Arbitrator can order money apportioned for the benefit of dependants to be invested, even though the applicant is the legal personal representative of the deceased. See *Daniel* v. *Ocean Coal Co., Ltd.*, p. 196.

Sched. I. (7.)

(7.) Any sum which is agreed or is ordered by the committee or arbitrator to be invested may be invested in whole or in part in the Post Office Savings Bank by the registrar of the county court in his name as registrar.

Sched. I. (8.)

(8.) Any sum to be so invested may be invested in the purchase of an annuity from the National Debt Commissioners through the Post Office Savings Bank, or be accepted by the Post-

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master-General as a deposit in the name of the registrar as such, and the provisions of any statute or regulations respecting the limits of deposits in savings bank, and the declaration to be made by a depositor, shall not apply to such sums. Sched. I. (8.)

(9.) No part of any money invested in the name of the registrar of any county court in the Post Office Savings Bank under this Act shall be paid out, except upon authority addressed to the Post-master-General by the Treasury or by the judge of the county court. Sched. I. (9.)

(10.) Any person deriving any benefit from any moneys invested in a post office savings bank under the provisions of this Act may, nevertheless, open an account in a post office savings bank or in any other savings bank in his own name without being liable to any penalties imposed by any statute or regulations in respect of the opening of accounts in two savings banks, or of two accounts in the same savings bank. Sched. I. (10.)

These four clauses deal with the manner in which money awarded to dependants may be invested. It may be invested in the Post Office Savings Bank by the Registrar of the County Court in his name as Registrar, either in the purchase of an annuity or as a deposit, and no part of any money so invested will be paid out, except upon the authority of the Treasury or County Court Judge. When money is so invested on behalf of a dependant, the dependant may, nevertheless, have an ordinary Savings Bank Account in that or in any other Savings Bank. The ordinary limits respecting deposits

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Sched. I. (10.) in Savings Banks are not to apply to sums invested for the benefit of dependants.

All information regarding investments in the Post Office Savings Banks will be found in the Post Office Handbook.

OTHER INVESTMENTS.—It will be noticed that the word used in these clauses is 'may' and not 'shall.' Consequently these are not the only investments open to an Arbitrator under Schedule I. (6), and if more advantageous investments are to be found, the Arbitrator is not bound to order the money to be invested in any of the securities mentioned in these clauses. He might, for instance, think it more advantageous for a dependant to purchase an annuity from a high-class Insurance Company, and if so, there is nothing to prevent him from ordering this to be done.

Sched. I. (11.) (11.) Any workman receiving weekly payments under this Act shall, if so required by the employer, or by any person by whom the employer is entitled under this Act to be indemnified, from time to time submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, or such other person; but if the workman objects to an examination by that medical practitioner, or is dissatisfied by the certificate of such practitioner upon his condition when communicated to him, he may submit himself for examination to one of the medical practitioners appointed for the purposes of this Act, as mentioned in the Second Schedule to this Act, and the certificate of that medical practitioner as to the condition of the workman at the time of the examination shall be given to the employer and workman, and shall be conclusive evidence

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of that condition. If the workman refuses to submit himself to such examination, or in any way obstructs the same, his right to such weekly payments shall be suspended until such examination has taken place. Sched. I. (11.)

As to the right of an employer to compel an injured workman to submit to a medical examination after he has given notice of injury and before an award has been made, see Schedule I. (3) and notes thereon at p. 193.

As to the mode of procedure to be adopted when it is alleged by the employer, or by any person by whom the employer is entitled to be indemnified, that the workman refuses to submit himself for examination, see Rule 50.

In the Regulations made by the Secretary of State and the Treasury as to the appointment and payment of Medical Referees, there is apparently no reference to a submission for examination under this clause, *i.e.* where the workman submits himself for examination to a Medical Referee, either because he objects to the medical practitioner provided by the employer or is dissatisfied with his certificate. They deal only with references to Medical Referees made by Arbitrators, when the evidence given before them is conflicting. This is strange, as this clause gives the workman the right of obtaining the services of such Medical Referees after an award has been made.

WHO IS TO PAY MEDICAL REFEREE UNDER THIS CLAUSE?—Schedule II. (13), which provides for the appointment of medical practitioners for the purpose of this Act, states that 'the expense of any such medical practitioner shall, subject to Treasury regulations, be paid out of moneys provided by Parliament.' From these words it would appear that it was the intention of the Legislature, that Medical Referees should be paid by the Treasury whenever called upon to do work, either by an Arbitrator or by a workman. But, as pointed out above, in the Regulations made by the Secretary of State and the Treasury, there is no reference to a submission for examination by the workman under this

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Sched. I. (11.)

clause; the only fees mentioned in the Regulations to be paid by the Treasury are those due to a Medical Referee who has been called upon to act by an Arbitrator. And that this has been done intentionally, appears from a Home Office Memorandum dated 19th April 1898 (see p. 317), towards the end of which are these words:—'The fee for the examination of a workman in receipt of an allowance, who submits himself voluntarily, is payable, not by the Treasury, but by the workman, who may be required to pay a reasonable fee before the examination is made.'

Hence it is clear that, if a workman submits himself for examination by a Medical Referee under this clause, he and not the Treasury must pay the fee. But this may lead to difficulties. Supposing a workman submits himself for examination by a medical practitioner provided by the employer and is dissatisfied with his certificate. He is then entitled under this clause to submit himself for examination to a Medical Referee. Supposing he does so, but refuses before the examination is made to pay a reasonable fee, what will be the result. Will his right to weekly payments be suspended? They are only to be suspended if he 'refuses to submit himself to such examination, or in any way obstructs the same.' Under the circumstances, he certainly cannot be said to refuse to submit himself for examination, nor would it appear that, by refusing to pay the fee, he 'in any way obstructs the same,' because there is nothing in the Act which compels him to pay any fee, and the regulation made by the Secretary of State with reference to it would appear to be *ultra vires*. See note under Schedule II. (13), at p. 233.

Such difficulties have in fact arisen in practice. It has been held by Arbitrators that a workman who neglects to submit himself to a Medical Referee does not necessarily 'refuse' to do so; that there is no duty cast upon the workman to pay the referee's fee, and of course no duty on the referee to examine without a fee. If, therefore, a workman is willing to be examined, but is unable to pay the fee, it cannot be said that 'he has refused to submit himself to such examination.' On the other hand, there is nothing in the Act which can compel

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an employer to pay the fee. The result is a deadlock, and such deadlock arises through the Secretary of State and the Treasury, in their Regulations with respect to Medical Referees, (p. 318) having neglected to provide for submissions under this clause, whereas it was clearly the intention of the Legislature that the fees of the Medical Referees should in all cases be paid by the Treasury. Owing to the difficulties mentioned, attempts to have weekly payments suspended have so often proved abortive, that it has become practically impossible for employers to make use of this clause. When, therefore, they think that a workman in receipt of weekly payments under an award is malingering, they will be well advised to ignore this clause, and proceed under Schedule I. (12) by making an application for the review or termination of the award; and if the medical evidence is then conflicting, the Arbitrator can, though he is not compelled to do so, order the workman to submit himself for examination by a Medical Referee, as proceedings under Schedule I. (12) are arbitration proceedings, and the Arbitrator 'may appoint any such practitioner (*i.e.* Medical Referee) to report on any matter which seems material to any question arising in the Arbitration' (Schedule II. (13)). **Sched. I. (11.)**

ADVANTAGE OF A SUBMISSION.—The advantage of a workman submitting himself for examination by a Medical Referee is, that such an examination sets the matter at rest, as the certificate given by the Medical Referee is conclusive evidence of the condition of the workman at the time of the examination. See *Boase Spinning Co., Ltd.* v. *M'Avan* in Addendum, p. 346.

(12.) Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act. **Sched. I. (12.)**

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Sched. I. (12.)

The object of this clause is to enable either party, should he be of opinion that the weekly payment ought to be readjusted, to request that the compensation payable be reviewed. Under Schedule I. (1) (*b*) the weekly payment is to be made 'during incapacity.' If the incapacity is diminished or ceases to exist, the employer can have the award reviewed; if the incapacity becomes worse (*e.g.* if a workman, who was partially incapacitated at the time the award was made, afterwards becomes totally incapacitated), the workman has also the right of having the weekly payments reviewed.

But the only matter that is to be subject to a review is the amount of compensation payable. The employer's original liability cannot be called into question, or, in other words, there can be nothing in the nature of a new trial. Indeed a County Court Judge has no power to grant a new trial under this Act (*Mountain* v. *Parr* [1899] 1 Q.B. 805; 80 L.T.R. 342; 15 T.L.R. 262).

In *Crossfield and Sons, Ltd.* v. *Tanian* ([1900] 2 Q.B. 629; 82 L.T.R. 813), a workman who lost his eye through an accident arising out of and in the course of his employment, filed a request for arbitration in which he alleged that at the time of the accident his average weekly earnings were 30s., but that since he had only been able to earn an average of 17s. a week. The employers filed an answer in which they alleged that his average weekly earnings at the time were only 19s. 10d., but this answer was not filed within the time fixed by Rule 17. At the hearing of the workman's application, the County Court Judge refused to admit the evidence tendered by the employers as to the workman's wages at the time of the accident, and on the basis of the workman's allegation as to his former rate of wages, he awarded as compensation a weekly payment of 12s. 6d. Seven months afterwards, the employers applied to the County Court Judge for a review of his order for the payment of 12s. 6d. a week. It was admitted by them that no fresh circumstances had arisen since the award. The County Court Judge refused to review his order, whereupon the employers appealed.

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The Court of Appeal (Williams L.J. doubting) held that, as the employers' application for a review was in substance an attempt to impeach the original award, the County Court Judge was right, as Schedule I. (12) does not give any power to review, except where new facts have occurred since the award. **Sched. I. (12.)**

DOES EMPLOYER INCLUDE UNDERTAKER?—The right to have an award reviewed is given only to the employer and the workman. But it will often happen that the person paying the compensation is not the employer of the recipient of it (see p. 88). An undertaker may be paying a weekly sum to a workman in the employ of a sub-contractor, who is not liable to indemnify the undertaker under Sec. 4. In such a case the sub-contractor would have no interest in the matter. If the undertaker discovered that the workman had quite recovered, or was much better and was able to earn more than he could at the time the award was made, could he have the amount awarded reviewed? He is not the employer, and this clause provides that the request for a review must be made either by the employer or the workman. The real employer, the sub-contractor, might refuse to take any steps. Is the undertaker, then, to continue paying the weekly sum without having regard to the physical state of the workman? Such a state of things would be manifestly unfair; and, to prevent it, perhaps it would be held that the word 'employer' contained in this and the following clause, includes the 'undertaker' who is in fact paying the compensation.

PRINCIPLE ON WHICH WEEKLY PAYMENT ALTERED.—In deciding whether a weekly payment ought to be ended, diminished, or increased, the Arbitrator ought not to be content with regarding the average weekly earnings at the time of the review, but he must look at the future possibilities and what the result of the injuries might eventually be. The employer, for instance, might pay the workman the same wages he was earning before the accident, and then apply that

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Sched. I. (12.)

the award should be ended. In such a case the Arbitrator should consider whether the workman was in reality *earning* the same wages as before; whether his wage-earning capacity was the same—that is, whether he would be worth the same wages if he went into the employment of another employer; and if he came to the conclusion that he would not, he could then diminish the weekly payment and make it a nominal sum of 1d. a week, and thus preserve to the workman his right to have the award reviewed at any future time.

In *Hammersley* v. *Barratt* (109 Law Times 134), where a boy, who had been earning 6s. weekly, was awarded 3s. a week for injuries received, but who was afterwards taken back into the employment at 7s. a week, the employer applied for a review of the award, and for an order for the termination of the weekly payment. The Judge of the County Court was unwilling to put an end to the award altogether, as he was not satisfied that he would be able to earn the same amount elsewhere. He therefore made a similar declaration to that made in *Chandler* v. *Smith* (p. 19), namely, that the employer's liability to pay compensation still continued, though for the present no payment would be made.

WHEN WORKMAN EARNING SAME WAGES AS BEFORE ACCIDENT.—Where a workman is being paid the same wages as he was earning before the accident, it is a question of fact for the Arbitrator to determine whether his wage-earning capacity is diminished or not. In *Ellis* v. *Knott* (*Times*, 9th April 1900) a workman was injured who had been receiving 36s. a week, and his employers, who had for some weeks paid him 18s., under a memorandum registered under Schedule II. (8), applied to have the weekly payments reviewed on the ground that they were willing to take him into their employment again on the same work and at the same rate of wages. The County Court Judge, after hearing medical evidence, said that the workman could not work at the same employment at which he worked before the accident, or earn the wages he then earned; and that, in his opinion, he ought not to compel a man to go back to the employment to which he

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objected to go, even though the employer offered to make things easy and pay him his full wages. He accordingly refused to reduce the weekly payments, and the Court of Appeal declined to interfere with his decision. See also *Great North of Scotland Railway Co.* v. *Fraser* (38 S.L.R. 653).

Sched. I. (12.)

But where a workman who has obtained an award is in fact earning the same or more wages than he earned before the accident, the employer is entitled to have the weekly payments ended or reduced to a nominal sum on an application under this clause, as the Arbitrator, on such an application, cannot take into consideration what the workman would probably have been earning had he not met with the accident at all. This point was decided in *Pomphrey* v. *The Southwark Press* ([1901] 1 K.B. 86; 83 L.T.R. 468; 17 T.L.R. 53), where an apprentice sustained an injury to his right hand which prevented him from working as a skilled artisan, and the indenture of apprenticeship was cancelled. On an application for compensation, he obtained an award of a weekly payment based on his earnings during the previous year. At a later date his employers took him back into their employment as a labourer, at weekly wages higher than his wages at the time of the accident, but less than those which would be ordinarily paid to a workman employed on the same class of work, since the injury he had sustained affected his ability to earn full wages. On an application by the employers for the termination of the weekly payments, the County Court Judge dismissed the application, on the ground that the workman was earning less, by a sum equal to the amount of the weekly payment awarded, than if he had had the use of his right hand.

On appeal it was held that, on a review of a weekly payment under an award, the test to be applied is the difference between the amount of the average earnings before the accident and the average amount which the workman is able to earn after the accident; that there is nothing in the Schedule providing compensation in respect of the sums that the workman might have earned but for the accident; that the County

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Sched. I. (12.)

Court Judge was therefore wrong in refusing to review the weekly payment; but that the weekly payment should be continued at a nominal amount, in order to preserve the right of the applicant to make any further application that might become necessary.

In the Scotch case of *Freeland* v. *Macfarlane, Lang and Co.* (37 S.L.R. 599), however, a different conclusion was arrived at, it being held that an Arbitrator can consider the probabilities that if the injuries had not been sustained, the workman might be making more money.

Another important point was urged on behalf of the applicant in *Pomphrey* v. *Southwark Press* (*supra*), namely, that in the case of an apprentice the value of the tuition given to him ought to be taken into account, as the wages paid to him are not in proportion to the value of the work that he does. But as the point was not taken in the County Court, and as no attempt was made to quantify in money the value of the tuition, the Court did not decide the question, though it did express the opinion that incidental advantages should in certain cases be taken into consideration. On this point Smith M.R. said :—'I do not say that in the case of a gardener, supposing him to be within the Act, the fact that he was allowed a cottage free, worth, say, 5s. a week, might not be taken into consideration in arriving at the amount of his weekly earnings,' while Stirling L.J. said that the earnings possibly included, besides cash payments, other matters the value of which was capable of being estimated in money, such as clothes, board, and lodging.

An application to have an award reviewed must be made in accordance with Form 5 in Appendix B.

Sched. I. (13.)

(13.) Where any weekly payment has been continued for not less than six months, the liability therefor may, on the application by or on behalf of the employer, be redeemed by the payment of a lump sum, to be settled in default of agreement,

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by arbitration under this Act, and such lump sum may be ordered by the committee or arbitrator to be invested or otherwise applied as above mentioned. Sched. I. (13.)

Under this clause only the employer can redeem; the workman must be content to continue receiving his weekly payments, until his employer wishes to redeem.

If the word 'employer' is to be construed literally, the 'undertaker,' who has been paying compensation to a workman who was in the employ of a sub-contractor, will not be able to redeem. See note under Schedule I. (12), at p. 205.

The weekly payments cannot be redeemed until they have been continued for six months. As to the effect of an employer paying a lump sum in full satisfaction of the workman's claim before the expiration of that period, see notes under Sec. 1 (3), at p. 32; and under Schedule I. (*a*) (i), at p. 171

Where the weekly payments are redeemed by the payment of a lump sum, it would appear that the defendants, in case of the death of the workman, would not have any further claim upon the employer, as the matter would be *res judicata*.

AMOUNT OF LUMP SUM.—There is no limit to the amount payable on the redemption of weekly payments. In the case of permanent total incapacity, the workman is entitled to such a sum as will purchase him an annuity equal to the yearly total of the weekly payments. In the case of partial incapacity, he is entitled to the actuarial value of the weekly payment, less a deduction in respect of the contingency of his condition improving, in which case, if the weekly payments continued, they would partially or wholly cease. See *Pattinson and Sons* v. *Stevenson* (109 Law Times 106).

The lump sum to be paid by way of redemption may be agreed upon, or, in default of agreement, settled by arbitration. In the latter case it may be ordered to be invested as mentioned in Schedule I. (6—10).

(14.) A weekly payment, or a sum paid by way Sched. I. (14.)

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Sched. I. (14.) of redemption thereof, shall not be capable of being assigned, charged, or attached, and shall not pass to any other person by operation of law, nor shall any claim be set off against the same.

If weekly payments are in arrear, or if a sum agreed upon by way of redemption has not been actually paid when the workman dies, this provision ought not to prevent such sums from being paid to his legal personal representative.

Sched. I. (15.) (15.) Where a scheme certified under this Act provides for payment of compensation by a friendly society, the provisions of the proviso to the first sub-section of section eight, section sixteen, and section forty-one of the Friendly Societies Act, 1896,[1] shall not apply to such society in respect of such scheme.

The provisions of the Friendly Societies Act, 1896,[1] referred to are as follows :—

Proviso to the first sub-section of Sec. 8 :—'Provided that a Friendly Society which contracts with any person for the assurance of an annuity exceeding fifty pounds per annum, or of a gross sum exceeding two hundred pounds, shall not be registered under this Act.'

Sec. 16 :—'A Society assuring a certain annuity shall not be entitled to registry, unless the tables of contributions for the assurance, certified by the actuary to the National Debt Commissioners, or by some actuary approved by the Treasury, who has exercised the profession of actuary for at least five years, are sent to the registrar with the application for registry.'

Sec. 41 (1) :—'A member, or person claiming through a member, of a registered Friendly Society or branch, shall not be entitled to receive more than two hundred pounds by way

[1] 59 and 60 Vict. c. 25.

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of gross sum, together with any bonuses or additions declared upon assurances not exceeding that amount, or (except as provided by this Act) fifty pounds a year by way of annuity, from any one or more such societies or branches.' Sched. I. (16.)

(2) 'Any such society or branch may require a member, or person claiming through a member, to make and sign a statutory declaration that the total amount to which that member or person is entitled from one or more such societies or branches does not exceed the sums aforesaid.'

(16.) In the application of this schedule to Scotland the expression 'registrar of the county court' means 'sheriff clerk of the county,' and 'judge of the county court' means 'sheriff.' Sched. I. (16.)

(17.) In the application of this Act to Ireland the provisions of the County Officers and Courts (Ireland) Act, 1877,[1] with respect to money deposited in the Post Office Savings Bank under that Act shall apply to money invested in the Post Office Savings Bank under this Act. Sched. I. (17.)

SECOND SCHEDULE

ARBITRATION

The following provisions shall apply for settling any matter which under this Act is to be settled by arbitration:—

(1.) If any committee, representative of an employer and his workmen, exists with power to settle matters under this Act in the case of the Sched. II. (1.)

[1] 40 and 41 Vict. c. 56.

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Sched. II. 1.) employer and workmen, the matter shall, unless either party objects, by notice in writing sent to the other party before the committee meet to consider the matter, be settled by the arbitration of such committee, or be referred by them in their discretion to arbitration as hereinafter provided.

Sched. II. (2.) (2.) If either party so objects, or there is no such committee, or the committee so refers the matter or fails to settle the matter within three months from the date of the claim, the matter shall be settled by a single arbitrator agreed on by the parties, or in the absence of agreement by the county court judge, according to the procedure prescribed by rules of court, or if in England the Lord Chancellor so authorises, according to the like procedure, by a single arbitrator appointed by such county court judge.

Sched II. (3.) (3.) Any arbitrator appointed by the county court judge shall, for the purposes of this Act, have all the powers of a county court judge, and shall be paid out of moneys to be provided by Parliament in accordance with regulations to be made by the Treasury.

We have already seen that all questions arising under this Act, if not settled by agreement between the parties, must be settled by arbitration (Sec. I. (3)). The arbitrations are to be conducted according to the provisions of this Schedule, in the first two clauses of which three arbitration tribunals are established, viz. :—

(1) Arbitration by a Committee (Schedule II. (1)).

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(2) Arbitration by a single agreed Arbitrator (Schedule II. (2)). **Sched. II. (3.) (i-iii).**

(3) Arbitration in the County Court (Schedule II. (2)).

I.—ARBITRATION BY A COMMITTEE.

The Schedule does not point out how a committee representative of an employer and his workmen is to be called into existence, or how, if there be one in existence, it is to be ascertained whether it has 'power to settle matters under this Act.'

Whatever was the expectation of the Legislature, it is not likely that arbitration by a committee will often be resorted to. It was evidently the intention that such arbitrations should be of an informal and friendly nature, and consequently no form of procedure has been prescribed for the holding of them. The Rules made under the Act do not apply to procedure before a committee (Schedule II. (10), and see p. 229), and consequently a committee is entitled to adopt any course of procedure it thinks fit. Apparently when the arbitration is before a committee there is no power to procure the attendance of witnesses and the production of documents, as this power is by Schedule II. (4) only given to 'the County Court Judge or Arbitrator appointed by him,' while the Arbitration Act, 1889,[1] does not apply to an arbitration under this Act (Schedule II. (4)).

On the other hand, certain powers are expressly given to a committee. They are empowered to invest or otherwise apply money allotted as compensation (Schedule I. (6)), and are given similar powers over a lump sum paid to a workman by way of redemption of weekly payments (Schedule I. (13)). They may appoint a medical referee to report on any matter material to the arbitration (Schedule II. (13)), and they are required to send a memorandum of their award to the Registrar of the County Court (Schedule II. (8)), who is to record such memorandum in a special memorandum without fee. For form of memorandum, see Form 16 in Appendix B.

Whether a committee is entitled to submit a question of

[1] 52 and 53 Vict. c. 49.

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Sched. II. (3.)(i-iii).

law for the decision of the County Court Judge under Schedule II. (4), or to award costs under Schedule II. (6), is uncertain, as the provisions in those sections refer only to 'an arbitrator,' which term does not necessarily include a committee.

PARTIES NOT BOUND TO SUBMIT TO ARBITRATION BY COMMITTEE.—Even where there is such a committee as mentioned in Schedule II. (1) in existence, neither party is bound to submit to arbitration by such committee. Either party may object by notice in writing sent to the other party before the committee meet to consider the matter, and if such notice is sent, the committee will have no jurisdiction to decide the matter.

COMMITTEE MAY REFUSE TO ACT.—When there is such a committee in existence, under Schedule II. (1) they have power to hear and determine the arbitration themselves. But they are not bound to do so. In order to rid themselves of responsibility in the matter, they can adopt either of the following courses :—

(1.) Refer the matter to arbitration (Schedule II. (1)) ; or

(2.) Fail to settle the matter within three months (Schedule II. (2)), in which case the arbitration will be settled by one of the other tribunals.

It must be noticed that, though the committee can in their discretion refer the matter to arbitration, they cannot themselves appoint an Arbitrator. They are only authorised to refer the matter to arbitration 'as hereinafter provided,' that is to say, as provided by Schedule II. (2).

II.—ARBITRATION BY SINGLE AGREED ARBITRATOR.

As in the case of a committee, an arbitration before an arbitrator agreed upon between the parties, will be of an informal character. The Rules made under the Act do not apply to procedure before a single agreed Arbitrator (Schedule II. (10), and see p.), the words 'according to the procedure prescribed by rules of court' in this clause not referring to such an Arbitrator, but only to a County Court Judge or Arbitrator appointed by him. Consequently a single agreed Arbitrator is under the same disadvantage as a committee, in that he has

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apparently no power to compel the attendance of witnesses or procure the production of documents (see p. 213). Sched. II. (3.) (i-iii).

A single agreed Arbitrator, like a committee, can invest or otherwise apply money under Schedule I. (6) and (13), can appoint a medical referee under Schedule II. (13), and must send a memorandum of his award to the County Court for registration under Schedule II. (8). (See Form 16 in Appendix B.)

But he also has additional powers distinctly given to him. He is entitled to submit a question of law for the decision of the County Court Judge under Schedule II. (4), and to award costs under Schedule II. (6).

There is no provision in the Schedule for the remuneration of a single agreed Arbitrator. It is therefore clear that he will have to be paid by the parties.

Owing to the disadvantages to which a committee and single agreed Arbitrator are subjected, neither of these tribunals is likely to be resorted to, especially when the third tribunal is a County Court Judge or an Arbitrator appointed by him, whose services are available to the parties free of cost to them.

III.—ARBITRATION IN THE COUNTY COURT.

This is the tribunal most often resorted to on account of the many advantages it offers. The Arbitrator has greater powers than in the other tribunals, and no charge whatever is made to the parties for his services. The Arbitrator is either

(*a*) The County Court Judge of the district in which all the parties concerned reside, or if they reside in different districts, of the district in which the accident occurred (Schedule II. (9)); or

(*b*) An Arbitrator appointed by the County Court Judge of that district (Schedule II. (2) and Rule 27).

(*a*) **THE COUNTY COURT JUDGE AS ARBITRATOR.**—A County Court Judge sitting to hear an application for compensation under this Act, is acting as an Arbitrator and not as a Judge. Therefore, having once made his award, his duties in the matter end, and he has no jurisdiction to grant a new trial (*Mountain* v. *Parr* [1899] 1 Q.B. 805; 80 L.T.R. 342; 15 T.L.R. 262).

The County Court Judge, by Schedule II. (2), is to conduct

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Sched. II. (3.) (i-iii).

the arbitration 'according to the procedure prescribed by rules of Court.' Rules of Court have been drawn up under Schedule II. (10), and will be found in Appendix B. But though the County Court Judge becomes an Arbitrator, his duties as Arbitrator are to be part of the duties of the County Court, and the officers of the Court are to act accordingly. He has power to compel the attendance of witnesses and the production of documents (Schedule II. (4)). It will thus be seen that proceedings before a County Court Judge closely resemble proceedings in an ordinary action, although the arbitration is held under special rules.

APPEAL FROM COUNTY COURT JUDGE.—As to an appeal from a County Court Judge, see note under Schedule II. (4), at p. 218

(*b*) **ARBITRATOR APPOINTED BY THE COUNTY COURT JUDGE.**—In England the Lord Chancellor may authorise the appointment of a single Arbitrator by the County Court Judge. The provisions with respect to such an appointment will be found in Rule 27 (p. 271). These provisions assume that in some Courts the Lord Chancellor will make a general order authorising all claims under the Act to be referred to an Arbitrator. This will probably only be done where the work of the Court is so heavy and the claims under the Act likely to be so numerous, that they could not be satisfactorily or expeditiously dealt with by the Judge. In most cases, the Lord Chancellor does not make such a general order, but makes a special order from time to time, as application is made to him and as circumstances demand. Whether the Judge has authority to appoint under a general order or special order, in every case the Arbitrator appointed must be approved by the Lord Chancellor (Rule 27 (*a*) (*b*) (*d*)). This is an important provision, as there is nothing in the Act requiring an Arbitrator to possess any special qualifications. He might be a layman, but considering the many legal points that are raised at arbitrations, it is doubtful whether the Lord Chancellor would approve of the appointment of a layman.

ARBITRATOR HAS THE POWERS OF A COUNTY COURT JUDGE.—By Schedule II. (3) the Arbitrator appointed by the County Court Judge has 'all the powers of a County

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Court Judge,' that is to say, during the arbitration he is in the same position as the County Court Judge would be in, if he heard the arbitration himself. He is subject to the same rules of Court. He has the same powers of compelling the attendance of witnesses and the production of documents (Schedule II. (4)). His duties become 'part of the duties of the County Court,' and the officers of the Court shall act accordingly (Schedule II. (10)), and he is to hold the arbitration at the Court, unless the Judge otherwise directs (Rule 13 (2)). **Sched. II. (3.) (i-iii).**

But he differs from the Judge in one respect. Though his decision is final, he can submit any question of law for the decision of the County Court Judge (Schedule II. (4) and note thereon), which must be done by way of special case.

The services of an Arbitrator appointed by the Judge are given without anything being paid therefor by the parties, as he is paid by the Treasury (Schedule II. (3)).

In the case of the death, or refusal, or inability to act of an Arbitrator, a Judge of the High Court may appoint a new Arbitrator. See Schedule II. (7) and notes thereon.

For procedure before an Arbitrator appointed by the Judge, see Rules 27-31.

(4.) The Arbitration Act, 1889,[1] shall not apply to any arbitration under this Act; but an arbitrator may, if he thinks fit, submit any question of law for the decision of the county court judge, and the decision of the judge on any question of law, either on such submission, or in any case where he himself settles the matter under this Act, shall be final, unless within the time and in accordance with the conditions prescribed by rules of the Supreme Court either party appeals to the Court of Appeal; and the county court judge, or the arbitrator appointed by him, shall, for the purpose **Sched. II. (4.)**

[1] 52 and 53 Vict. c. 49.

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Sched. II. (4.) of an arbitration under this Act, have the same powers of procuring the attendance of witnesses and the production of documents as if the claim for compensation had been made by plaint in the county court.

As the Arbitration Act, 1889,[1] does not apply, the procedure in an arbitration before a County Court Judge or an Arbitrator appointed by him is regulated by the Act, and by the Rules made under the Act, and the arbitration is to be held according to the provisions of this Schedule.

SUBMISSION OF QUESTION OF LAW BY ARBITRATOR.—This clause enables an Arbitrator, if he thinks fit, to submit any question of law for the decision of the County Court Judge. Such submission must be in the form of a special case (Rule 30). As the decision of an Arbitrator is final, and as there is no appeal from him, even on a question of law, except by way of special case under this clause, he ought always to consent to state a case, where the question of law involved is of importance, or where he feels any doubt as to his decision. If the arbitration is heard before a Judge, this clause provides for an appeal from his decision on a question of law without sanction of the Judge; but when an Arbitrator takes the place of a Judge, there can be no appeal from him, unless he submits a question of law for the decision of the Judge. His findings of fact will not be disturbed unless there was no evidence to support them.

For procedure, when an Arbitrator consents to submit a question of law for the decision of the County Court Judge, see Rule 30.

APPEAL FROM COUNTY COURT JUDGE.—There is an appeal from the decision of the County Court Judge on any question of law, whether on a submission by an Arbitrator or in any case where he himself settles the matter. The appeal is direct to the Court of Appeal, whereas the appeal given by the County Court Act, 1888[2] (Sec. 120), is to a Divisional Court.

Such appeal is by notice of motion in accordance with

[1] 52 and 53 Vict. c. 49. [2] 51 and 52 Vict. c. 43.

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Order LIX. R. 10 of the Rules of the Supreme Court, and the notice of motion is an eight days' notice. The notice of motion must be served and the appeal entered within twenty-one days from the date of the award. See Rules of the Supreme Court in Appendix D, p. 325. A Form of Notice of Appeal will be found in Appendix H, p. 331. Sched. II. (4.)

WHERE NO RIGHT OF APPEAL.—The right of appeal from the decision of a County Court Judge is given by Schedule II. (4), and the only appeal given by this clause is from the decision of a County Court Judge on a question of law, (*a*) either on the submission of a question of law by an Arbitrator, or (*b*) in any case where the County Court Judge himself settles the matter under the Act. Therefore there is no appeal against the refusal of a County Court Judge to direct insurers to pay insurance money into the Post Office Savings Bank, in accordance with the provisions of Sec. 5 (1) of the Act (*Leech* v. *Life and Health Assurance Association* [1901] 1 K.B. 707; 84 L.T.R. 414; 17 T.L.R. 354. See p. 82). There may be an appeal to a Divisional Court of the King's Bench Division, under Sec. 120 of the County Courts Act, 1888.[1]

On the other hand an appeal lies against an interlocutory order made by an Arbitrator, as, for instance, an order under Schedule I. (3), that a workman should submit himself for examination by a medical practitioner on certain conditions (*Osborn* v. *Vickers, Sons and Maxim*, p. 194).

Applications in the nature of a *mandamus* in matters arising under the Act must be made to the Divisional Court (*Welland* v. *Great Western Railway Co.*, 16 T.L.R. 297).

APPEAL TO HOUSE OF LORDS.—An appeal lies from a decision of the Court of Appeal under this Act to the House of Lords without leave. But as regards decisions in Scotland, no appeal lies from a decision of the Court of Session (*Osborne or M'Kinnon* v. *Barclay, Curle and Co.* [1901] A.C. 269; 38 S.L.R. 611). This is a somewhat anomalous condition of things, but it results from the use of the word 'finally' in Schedule II. (14) (*c*). See p. 235.

SECURITY FOR COSTS.—The ordinary rule of the Court of Appeal as to ordering security for the costs of an appeal is applicable to appeals under this Act. This was decided in

[1] 51 and 52 Vict. c. 43.

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Sched. II. (4.)

Hall v. *Snowden, Hubbard and Co.* ([1899] 1 Q.B. 593; 80 L.T.R. 256; 15 T.L.R. 244). The claim for compensation was by an infant child of a deceased workman, suing by his next friend. The County Court Judge gave judgment for the respondents, who on representations made to them of the poverty of the applicant, did not ask for costs, but as the applicant desired to appeal to the Court of Appeal on a question of law, the respondents made an application for an order for security for costs. From the affidavits it was clear, that if unsuccessful, the applicant would not be able to pay the costs of the appeal, and the Court held that, in accordance with the ordinary rule, security for costs must be given to the amount of £15. 'The ordinary rule of this Court,' said Smith L.J., 'is that, except in applications for new trials, when the respondent can show that the appellant, if unsuccessful, would be unable through poverty to pay the costs of the appeal, an order for security of costs is made. What is there to take the case before us out of that rule? It is clear that the appellant will be unable to pay to the respondents their costs of the appeal should it be unsuccessful, and, in my opinion, in this and similar cases, security should be ordered. If an appellant is in a position to obtain an order for leave to appeal in *formâ pauperis*, he can do so, and no security would then be required; but I may point out that in such a case the respondent gets this protection—that an appellant cannot obtain such an order without a certificate from counsel that the case is a proper one for appeal.' See also *In re Harwood and Abrahams* ([1901] 2 K.B. 304).

But where an award was made in favour of the employers, but the County Court Judge ordered a stay of execution pending appeal, so that a point of law might be decided, the Court of Appeal refused to order security for costs, on the ground that the Judge had in effect invited the parties to come to that Court to have a point of law determined (*Hubball* v. *Everitt and Sons, Ltd.*, 16 T.L.R. 168).

IN ACCORDANCE WITH THE CONDITIONS PRESCRIBED BY RULES OF THE SUPREME COURT.—Rules of the Supreme Court have been framed dealing with appeals from a County Court Judge, and will be found in Appendix D, p. 325.

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(5.) Rules of court may make provision for the appearance in any arbitration under this Act of any party by some other person. Sched. II. (5.)

Rule 32 provides as to who may appear at an arbitration under the Act. See Rule 32 on p. 274.

(6.) The costs of and incident to the arbitration and proceedings connected therewith shall be in the discretion of the arbitrator. The costs, whether before an arbitrator or in the county court, shall not exceed the limit prescribed by rules of court, and shall be taxed in manner prescribed by those rules. Sched. II. (6.)

THE COSTS OF AND INCIDENTAL TO.—This clause deals only with the costs between the parties; the costs of a solicitor or agent to the applicant are dealt with in Schedule II. (12).

THE DISCRETION OF THE ARBITRATOR.—Discretion is given to the Arbitrator to decide which party shall pay the costs of the other, or whether each party shall pay his own costs. The amount of costs is limited, as they are not to exceed the limit prescribed by Rules of Court. But in dealing with the question of costs, the Arbitrator can take into consideration any offer of compensation that has been made on behalf of the employer (Rule 33 (3)). If, for instance, an employer has previously made an offer as advantageous to the workman as the award that is eventually made, and the workman has refused to accept such offer, the Arbitrator can direct that the employer shall be paid the costs he has incurred since he made the offer, and that the workman shall be paid those incurred by him up to the time that the offer was made, or in his discretion he may award a fixed sum for costs (*Welland* v. *Great Western Railway Co.*, 16 T.L.R. 297). The former method would be a practice analagous to that directed by the Rules, when the respondent submits to an award. but the workman does not

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Sched. II. (6.)

accept the weekly payment, if no greater weekly payment is awarded than that which the respondent had submitted to pay (Rule 18).

LIMIT PRESCRIBED BY RULES OF COURT.—Rule 33 provides that the Arbitrator (whether he be the Judge, an Arbitrator appointed by him, or an Arbitrator agreed upon by the parties) can direct costs to be paid by one party to the other according to one of the scales of costs applicable in the County Court, and that, in default of any special order as to the scale to be adopted, the costs shall be taxed according to the scale which would be applicable if the proceeding had been an action in the County Court. Where the award is a weekly payment, the Judge or Arbitrator is to determine what amount must be considered its value for the purpose of taxation.

Where a workman submits himself for examination to a Medical Referee under Schedule I. (11), and the certificate of the Medical Referee is used in any subsequent arbitration, any reasonable travelling and other expenses incurred by the workman in obtaining such certificate may be allowed as costs in the arbitration (Rule 33 (4)). As pointed out in the note under Schedule I. (11) (p. 201), it would have been thought that any fee payable to a Medical Referee would be paid by the Treasury. As, however, this is not so, if the workman pays such fee, it will be part of the expenses incurred by him in obtaining the certificate, and an order can be made that such sum shall be repaid him as costs in the arbitration.

Where a workman is ordered to submit himself to such an examination under Schedule II. (13), the fee of the Medical Referee is payable by the Treasury, but any reasonable expenses incurred by the workman in travelling to attend the examination may be allowed as costs in the arbitration (Rule 33 (5)).

SCALES OF COSTS APPLICABLE TO ACTIONS IN COUNTY COURT.—There are four such scales of costs :—

(1) Lower scale, where the amount recovered exceeds £2 and does not exceed £10.

(2) 'A' scale, where the subject-matter or sum recovered exceeds £10 and does not exceed £20.

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(3) 'B' scale, where the subject-matter or sum recovered exceeds £20 and does not exceed £50. **Sched. II. (6.)**

(4) 'C' scale, where the subject-matter or sum recovered exceeds £50.

ALL COSTS TO BE TAXED.—By Rule 33 (1) any costs directed to be paid by one party to another, must, in default of agreement between the parties as to the amount of such costs, be taxed, and in practice they will be taxed by the Registrar.

WHEN ARBITRATION BEFORE COMMITTEE OR AGREED ARBITRATOR.—Does this clause refer to an arbitration before a committee or an agreed Arbitrator? The costs are not to exceed the limit prescribed by Rules of Court, and as pointed out under Schedule II. (1) and (2), the Rules made under the Act do not apply to procedure before a committee or agreed Arbitrator. But this clause clearly includes an agreed Arbitrator, as it speaks of costs, 'whether before an Arbitrator, or in the County Court'; and from the wording of Rule 33 (1), it will be seen that the Rule Committee regard this clause as referring to a single agreed Arbitrator. It would appear, then, that, as far as the awarding of costs is concerned, the Rules do apply to a single agreed Arbitrator.

On the other hand, it is very doubtful whether they apply to a committee. Can a committee be said to be included in the term 'Arbitrator'? If not, neither this clause nor the Rules affect the awarding of costs by a committee. Indeed, in Rule 33 there is no mention whatever made of costs awarded by a committee.

For further notes on this subject see Schedule II. (10), at p. 229.

FEE PAYABLE TO AGREED ARBITRATOR.—The 'costs of and incident to the arbitration and proceedings connected therewith' are, by this clause, in the discretion of the Arbitrator, and as pointed out above, 'Arbitrator' includes a single agreed Arbitrator. In the Rules there is no provision for the payment of a single agreed Arbitrator, but as the Rules generally only affect proceedings in the County Court, it seems that a single agreed Arbitrator has authority to include in his award the fee payable to himself.

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Sched. II. (6.) The following Rules deal with costs in arbitrations in the County Court:—Rule 18 (5) (*c*), Rule 18 (6), Rule 30 (7), and Rule 33.

Sched. II. (7.) (7.) In the case of the death or refusal or inability to act of an arbitrator, a Judge of the High Court at Chambers may, on the application of any party, appoint a new arbitrator.

This provision includes both an agreed Arbitrator and an Arbitrator appointed by the County Court Judge, but it is extremely doubtful whether it would apply to the filling of a vacancy on a committee. Where a Judge of the High Court appoints an Arbitrator in the place of one appointed by the County Court Judge, the order appointing such Arbitrator is to be lodged with the Registrar, and the Registrar is to act and the arbitration to proceed in the same manner as if the Arbitrator had been appointed by the County Court Judge (Rule 27 (*e*)).

An application for the appointment of a new Arbitrator under Schedule II. (7) must be made by summons (Order LIV. Rule 1, A. 3 of the Rules of the Supreme Court. See Rule in Appendix D, p. 324).

Sched. II. (8.) (8.) Where the amount of compensation under this Act shall have been ascertained, or any weekly payment varied, or any other matter decided, under this Act, either by a committee or by an arbitrator or by agreement, a memorandum thereof shall be sent, in manner prescribed by rules of court, by the said committee or arbitrator, or by any party interested, to the registrar of the county court for the district in which any person entitled to such compensation resides, who

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shall, subject to such rules, on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the said memorandum shall for all purposes be enforceable as a county court judgment. Provided that the county court judge may at any time rectify such register. Sched. II. (8.)

This clause affects not only a committee and a single agreed Arbitrator, but also the parties themselves when they have entered into an agreement. It provides that a memorandum of the award made by a committee or Arbitrator, or of the amount agreed upon between the parties, shall be sent to the Registrar of the County Court. It may be sent either by the committee, the Arbitrator, or by any party interested. But by whomsoever sent the Registrar must, on being satisfied as to its genuineness, record it as directed. Whether the agreement is for the payment of a weekly sum or of a lump sum, it is in the interest of both parties that it should be recorded under this clause. As to the matters on which the parties are authorised to come to an agreement, see note under Sec. 1 (3) at p. 31, and when an agreement has been arrived at on any of these points, advantage should be taken of this clause.

OBJECTS OF THE CLAUSE.—The object of this clause is to place an award made by a committee or agreed Arbitrator upon the same footing as one made by the County Court Judge, or by an Arbitrator appointed by him. When once recorded the memorandum is enforceable as a County Court judgment, and consequently is as binding as an award made in the County Court.

Another object of this clause is to make an agreement arrived at between the parties binding. This is achieved by providing that a memorandum of the agreement shall be sent to the Registrar, who, if satisfied as to its genuineness, will record it, whereupon it will become enforceable as a County Court judgment.

The Form of Memorandum under Schedule II. (8) is Form 16 in Appendix B.

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(Sched. II. (3.)) Specimens of agreements arrived at will be found in Appendix G, at p. 328.

WHERE MEMORANDUM TO BE SENT.—The memorandum is to be sent to the Registrar of the County Court of the district in which any person entitled to such compensation resides. It is a great advantage to the workman to have the memorandum recorded in the County Court of the district in which he resides. Were it not for this clause, it would have to be sent to the Registrar of the County Court in the district in which all the parties concerned resided, or if they resided in different districts, the district in which the accident occurred (Schedule II. (9)).

REGISTRAR MUST BE SATISFIED AS TO GENUINENESS OF MEMORANDUM.—The Registrar must first of all be satisfied as to the genuineness of the memorandum, and when he is so satisfied, he shall, subject to the Rules of Court, record the same. As to what he will require before being satisfied as to genuineness of a memorandum, see Rules 39 to 45.

MEMORANDUM OF DECISION ARRIVED AT BY AGREEMENT.—When the parties have arrived at an agreement as to the amount of compensation to be paid, no time should be lost in sending a memorandum of it to the Registrar, as Rule 38 (1) says that it 'shall be left at the office of the Registrar or sent by post by registered letter addressed to the Registrar at his office *as soon as may be after the matter has been decided.*' If all the parties admit the genuineness of the memorandum, it will be recorded. But if any party disputes the genuineness of it, it will not be recorded without the consent in writing of the party disputing it, or by an order of the Judge. The proceedings on an application to the Judge for a record of a memorandum will be governed by Rule 45.

The Rules dealing with the registration of a memorandum, are Rules 38 to 45.

ENFORCEABLE AS A COUNTY COURT JUDGMENT.—An award made or an agreement recorded under the Workmen's Compensation Act can be enforced by a judgment summons and an order to commit the employer to prison for non-payment of the amount due under such award or agreement. In *Bailey* v. *Plant* ([1901) 1 K.B. 31; 83 L.T.R. 459; 17 T.L.R. 48) payments under an award having fallen into arrear, the workman applied for a committal order against the respondent

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under the Debtor's Act, 1869,[1] Sec. 5. The County Court Judge was satisfied that the respondent had had the means to pay the amounts in arrear since they became due; but he held that Schedule II. (8) did not give him jurisdiction to commit the respondent, because a committal order could not properly be said to be a mode of enforcing a judgment of a County Court. The Court of Appeal, however, without deciding that the matter was a proper one to be brought before them, held that he had such jurisdiction. **Sched. II. (8.)**

Upon the matter coming back to the learned Judge, he again refused to make an order of committal on the ground that Schedule II. (8) did not apply, because no memorandum of the award had been sent to the Registrar or recorded by him in the register, though it was admitted that the award itself had been so sent and registered. There was therefore a second appeal (17 T.L.R. 449), which was allowed, the Lord Chief Justice observing that to read the paragraph as was suggested would make it unworkable. The paragraph provides that a memorandum of the award shall be accepted in orde to prevent the necessity of sending the more formal document, but the best memorandum of the award is undoubtedly the award itself.

See Rule 8 of the Workmen's Compensation Rules, 1900, in Appendix I.

(9.) Where any matter under this Act is to be done in a county court, or by to or before the judge or registrar of a county court, then, unless the contrary intention appear, the same shall, subject to rules of court, be done in, or by to or before the judge or registrar of, the county court of the district in which all the parties concerned reside, or if they reside in different districts the district in which the accident out of which the said matter arose occurred, without prejudice to any transfer in manner provided by rules of court. **Sched. II. (9.)**

[1] 32 and 33 Vict. c. 62.

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Sched. II. (9.) See note under Schedule II. (8) at p. 226, where it is pointed out that a contrary intention appears in that clause.

ANY TRANSFER IN MANNER PROVIDED BY RULES OF COURT.—Rule 61 provides for such transfer. It is thought that there is no power to transfer when an award or agreement has been recorded under Schedule II. (8), which is very emphatic as to which Court a memorandum shall be recorded in. When once recorded, any steps to have it enforced must be taken in the Court in which it is recorded, and no application for a transfer can be made under Schedule II. (9).

Sched. II. (10.) (10.) The duty of a county court judge under this Act, or of an arbitrator appointed by him, shall, subject to rules of court, be part of the duties of the county court, and the officers of the court shall act accordingly, and rules of court may be made both for any purpose for which this Act authorises rules of court to be made, and also generally for carrying into effect this Act so far as it affects the county court, or an arbitrator appointed by the judge of the county court, and proceedings in the county court or before any such arbitrator, and such rules may, in England, be made by the five judges of the county courts appointed for the making of rules under section one hundred and sixty-four of the County Courts Act, 1888,[1] and when allowed by the Lord Chancellor, as provided by that section, shall have full effect without any further consent.

RULES OF COURT.—Rules of Court have been made under the authority given by this clause, and consequently all arbitrations in the County Court, whether before the Judge or Arbitrator appointed by him, will be governed by those rules.

[1] 51 and 52 Vict. c. 43.

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Whether the Rules of Court affect procedure at arbitrations before a committee or agreed Arbitrator, is another question. This clause authorises Rules of Court to be made for two purposes, namely— **Sched. II. (10).**

(1) For any purpose for which this Act authorises Rules of Court to be made, and

(2) Generally for carrying into effect this Act so far as it affects the County Court, or an Arbitrator appointed by the Judge of the County Court, and proceedings in the County Court or before any such Arbitrator.

The second purpose for which rules are to be made, clearly only refers to arbitrations in the County Court, and in such arbitrations they are to be made to carry into effect the Act and govern the proceedings.

When the clause states that rules are to be made for any purpose for which this Act authorises them to be made, are those words to be read in conjunction with the words 'so far as it affects the County Court'? If so, then this clause does not affect arbitrations before a committee or agreed Arbitrator. And this is the view taken of it by the Rules Committee, for, in their Explanatory Memorandum issued with the Rules, they say :—

'It is apprehended that the Rules Committee have no power to make rules as to the procedure before a committee or an Arbitrator agreed upon by the parties; but paragraphs 4 to 6, 8, 12 and 13 of Schedule II. appear to apply to such an Arbitrator as well as to one appointed by the Judge.'

From this it appears that the rules authorised to be made by Schedule II. (10) affect only arbitrations before the County Court Judge or his Arbitrator, at all events as far as procedure is concerned, and that the other tribunals can adopt what procedure they think fit. This would appear to be so, with the following exceptions :—

(1) Schedule II. (5) provides for the appearance of any party by another person in *any* arbitration, which will therefore include both arbitrations before a committee and agreed Arbitrator.

(2) Schedule II. (6) authorises an agreed Arbitrator to award costs, which will be taxed.

(3) Schedule II. (8) provides that when an award is made

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Sched. II. (10.)

by a committee or an agreed Arbitrator, a memorandum of it must be sent to the Registrar.

With these trifling exceptions the rules apparently have no reference to arbitration proceedings before a committee or an agreed Arbitrator, though it is known that the contrary view has sometimes been held. But as the arguments which have led to the conclusion drawn above would occupy too much space to set out in detail, and as these arbitration tribunals will seldom if ever be resorted to, it has been thought well not to discuss the matter technically and in detail.

Sched. II. (11.)

(11.) No court fee shall be payable by any party in respect of any proceeding under this Act in the county court prior to the award.

This provision is a great boon to workmen, as it gives them the services of the County Court Judge or Arbitrator appointed by him, and also of the officials of the Court, as well as the Court itself for the hearing of the arbitration, without requiring him to pay anything for the same. It is very different from bringing an action in the County Court, when the costs of the plaint and hearing fee have to be paid before a plaintiff is entitled to have his cause tried. In arbitrations under this Act, the workman has nothing whatever to pay before the award is made, though all the preliminary proceedings, such as the filing of his request for arbitration, etc., are done for him just as in an action.

The only fee he will apparently have to pay after the award will be a small sum for obtaining a copy of it.

Sched. II. (12.)

(12.) Any sum awarded as compensation shall be paid on the receipt of the person to whom it is payable under any agreement or award, and his solicitor or agent shall not be entitled to recover from him, or to claim a lien on, or deduct any amount for costs from, the said sum awarded, except such sum as may be awarded by the arbitrator or county court judge, on an application made by either party to determine the amount of

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costs to be paid to the said solicitor or agent, such sum to be awarded subject to taxation and to the scale of costs prescribed by rules of court. Sched. II. (12.)

SHALL BE PAID ON THE RECEIPT OF THE PERSON TO WHOM IT IS PAYABLE.—In all cases the compensation is to be paid to the person to whom it is payable, and a receipt given for it. If the compensation is a weekly sum awarded to an injured workman, it must be paid to him. If it is a lump sum awarded in case of death, it must be paid to legal personal representative, or, if ordered to be invested in the name of the Registrar, to the Registrar (*Daniel* v. *Ocean Coal Co., Ltd.*, 16 T.L.R. 368; see p. 196). If there is no legal personal representative, it must be paid to the dependants, or to a trustee for the benefit of the dependants, if the award so orders (Schedule I. (4)). In all cases the receipt must be given by the person to whom the compensation is payable, that is to say, by the workman himself, by his legal personal representative, by his dependants, by some one who receives for the benefit of the dependants, or by the person to whom the money is due under Schedule I. (1) (*a*) (iii).

MUST EMPLOYER FOLLOW WORKMAN WHEREVER HE MAY GO?—If an award is made against an employer, does the ordinary rule that a creditor must seek his debtor apply, or can the employer pay the weekly sum awarded in any other way? If, for instance, the workman leaves the town in which he is employed, must the employer follow him wherever he goes and obtain receipts for weekly payments, or will it be enough that he gives the workman facilities for obtaining payment?

The award, as has been seen (p. 226), is 'enforceable as a County Court judgment.' Has it therefore the effect of a County Court judgment? If so, the provisions of the County Courts Act, 1888,[1] may apply to it. Sec. 105 of that Act provides that all money paid under judgments, whether by instalments or otherwise, must be paid into Court. If the employer has difficulty in reaching the person to whom the compensation is payable, can he take advantage of this section and pay the money into Court, or do the words 'shall be paid

[1] 51 and 52 Vict. c. 43.

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Sched. II. (12.)

on the receipt of the person to whom it is payable' prevent him from doing so? It is anticipated that he can get rid of his liability by paying the money into Court, for, even in such a case, the money is eventually paid 'on the receipt of the person to whom it is payable,' though it is paid through the medium of the County Court.

COSTS.—This section only deals with the costs which the solicitor is able to recover from the applicant over and above the costs paid by the other side, the latter costs being dealt with in Schedule II. (6). As a general rule, where costs are given against a respondent which a solicitor is able to recover, he will probably have to be content with these, and will not be entitled to be awarded any costs over and above these, to be paid by applicant. But special circumstances may arise, such as where an applicant is deprived of his costs for not having accepted an offer previously made by the respondent, when an application under this clause would be justified.

HOW APPLICATION TO BE MADE.—The procedure affecting applications for determining the amount of costs to be paid to the applicant's solicitor by the person to whom the compensation is payable is regulated by Rules 46 and 47.

The application may be made at or immediately after the hearing of the arbitration, and if not made then, it may be made at any subsequent date, but in the latter event it must be made to the Judge (Rule 46 (*a*) and (*b*)).

The Arbitrator or County Court Judge is to determine 'the amount of costs,' and the amount awarded will afterwards be subject to taxation. On the hearing of an application, the Judge or Arbitrator may award costs to the solicitor, and make either of the following orders:—

(1) Declare him to be entitled to a lien for such costs on any sum awarded as compensation to such person; or

(2) Declare him to be entitled to deduct such costs from any such sum (Rule 46 (*e*)).

Such costs are, in default of agreement, to be taxed according to the scale in operation in the County Court as shall be directed, or if there is no direction, according to the scale which would be applicable if the proceeding had been an action in the County Court (Rule 46 (*b*)).

RECOVERY OF COSTS AWARDED.—When either of the orders

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above mentioned has been made, the Registrar is, on application, to tax such costs, and issue a memorandum of the amount of costs to which the solicitor is entitled, for service on the party liable to pay the sum awarded as compensation (Rule 47 (*a*) (*b*)). **Sched. II. (12.)**

The party liable to pay such compensation must on demand pay to the solicitor the amount to which he is entitled, but he shall not be liable to pay any amount in excess of that which he is liable to pay for compensation, or to pay such amount by any other instalments than those by which he is liable to pay such compensation (Rule 47 (*d*)). This is a reasonable provision, as the party paying the costs is really discharging the applicant's debt out of moneys belonging to the applicant; hence he cannot be compelled to pay more than is at the time due from him to the applicant.

RECOVERY OF COSTS WHEN APPLICANT UNSUCCESSFUL.—As has been pointed out above, this clause only refers to recovery of costs from a successful applicant over and above those which a solicitor is entitled to from the opposite party. It has no reference to recovery of costs from an unsuccessful applicant, which, it is presumed, can be recovered in the ordinary way.

(13.) The Secretary of State may appoint legally qualified medical practitioners for the purpose of this Act, and any committee, arbitrator, or judge may, subject to regulations made by the Secretary of State and the Treasury, appoint any such practitioner to report on any matter which seems material to any question arising in the arbitration; and the expense of any such medical practitioner shall, subject to Treasury regulations, be paid out of moneys to be provided by Parliament. **Sched. II. (13.)**

The Regulations made by the Secretary of State and the Treasury as to the appointment of Medical Referees will be found in Appendix C, and a Home Office Memorandum with regard to these appointments will be found there.

Though this clause states that such Medical Referees 'shall

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Sched. II. (13.) be paid out of moneys provided by Parliament,' in one instance, it appears that a Medical Referee must be paid by the workman himself. See note on p. 201.

Sched. II. (14.) (14.) In the application of this schedule to Scotland—

(*a*) 'Sheriff' shall be substituted for 'county court judge,' 'sheriff court' for 'county court,' 'action' for 'plaint,' 'sheriff clerk' for 'registrar of the county court,' and 'act of sederunt' for 'rules of court':

(*b*) Any award or agreement as to compensation under this Act may be competently recorded for execution in the books of council and session or sheriff court books, and shall be enforceable in like manner as a recorded decree arbitral:

(*c*) Any application to the sheriff as arbitrator shall be heard, tried, and determined summarily in the manner provided by the fifty-second section of the Sheriff Courts (Scotland) Act, 1876,[1] save only that parties may be represented by any person authorised in writing to appear for them and subject to the declaration that it shall be competent to either party within the time and in accordance with the conditions prescribed by act of sederunt to require the sheriff to state a case on any question of law determined by him,

[1] 39 and 40 Vict. c. 70.

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and his decision thereon in such case may be submitted to either division of the Court of Session, who may hear and determine the same finally, and remit to the sheriff with instruction as to the judgment to be pronounced. Sched. II. (14.)

DETERMINE THE SAME FINALLY.—Owing to the word 'finally' being used in the expression 'who may hear and determine the same finally,' it has been held that no appeal lies to the House of Lords from a decision of the Court of Session (*Osborne or M'Kinnon* v. *Barclay, Curle and Co.* [1901] A.C. 269; 38 S.L.R. 611). This is not only an anomalous condition of things, but it is also unfortunate, as some of the decisions of the Court of Session are contrary to those in the House of Lords, and the result is that though the same Act applies both to England and Scotland, different interpretations have been placed upon that Act in the two countries. The injustice that may arise is well pointed out in the Scottish Notes in 111 *Law Times*, on p. 28, from which the following extract is taken :—'Assume that the Court of Session takes one view of a section and the House of Lords in an immediately subsequent case takes another view of it, there is no means of having the decision of the Scottish Court overturned. Doubtless judgments of the House of Lords in English appeals under the Act will be held to bind the Scottish Courts in all subsequent cases raising the same question, but this does not obviate the injustice that may arise in particular cases.'

(15.) Paragraphs four and seven of this schedule shall not apply to Scotland. Sched. II. (15.)

(16.) In the application of this schedule to Ireland the expression 'county court judge' shall include the recorder of any city or town. Sched. II. (16.)

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WORKMEN'S COMPENSATION ACT, 1900

63 AND 64 VICT. C. 22.

An Act to extend the benefits of the Workmen's Compensation Act, 1897, *to Workmen in Agriculture.*

Sec. 1. (1.) Application of 60 and 61 Vict. c. 37 to agricultural work.

1.—(1.) From and after the commencement of this Act, the Workmen's Compensation Act, 1897, shall apply to the employment of workmen in agriculture by any employer who habitually employs one or more workmen in such employment.

Sec. 1. (2.)

(2.) Where any such employer agrees with a contractor for the execution by or under that contractor of any work in agriculture, section four of the Workmen's Compensation Act, 1897, shall apply in respect of any workman employed in such work as if that employer were an undertaker within the meaning of that Act.

Provided that, where the contractor provides and uses machinery driven by mechanical power for the purpose of threshing, ploughing, or other agricultural work, he, and he alone, shall be liable under this Act to pay compensation to any workman employed by him on such work.

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(3.) Where any workman is employed by the same employer mainly in agricultural but partly or occasionally in other work, this Act shall apply also to the employment of the workman in such other work. Sec. 1. (3.)

The expression 'agriculture' includes horticulture, forestry, and the use of land for any purpose of husbandry, inclusive of the keeping or breeding of live stock, poultry, or bees, and the growth of fruit and vegetables.

2. This Act may be cited as the Workmen's Compensation Act, 1900, and shall be read as one with the Workmen's Compensation Act, 1897, and that Act and this Act may be cited together as the Workmen's Compensation Acts, 1897 and 1900. Sec. 2. Short title.

3. This Act shall come into operation on the first day of July one thousand nine hundred and one. Sec. 3. Commencement of Act.

OBJECT OF THE ACT.—The object of this Act is clearly stated to be to extend the benefits of the Workmen's Compensation Act, 1897,[1] to workmen in agriculture. The Act of 1897 only applies to certain definite employments specified in Sec. 7 of that Act (see p. 88), and as employment in agriculture is not one of the employments therein specified, to bring agricultural labourers within the benefits of the Act, it was necessary to add this new measure to the Statute Book.

WORKMEN.—'Workman' will have the same meaning as it has in the principal Act. For definition of 'workman' see p. 150.

[1] 60 and 61 Vict. c. 37.

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WORKMEN IN AGRICULTURE.—What is 'agriculture'? The word 'agriculture' is used very broadly, and includes not only agriculture in its ordinary significance, but also 'horticulture, forestry, the use of land for any purpose of husbandry, inclusive of the keeping or breeding of live stock, poultry, or bees, and the growth of fruit and vegetables.' This definition is taken from the definition of agriculture given in Sec. 20 of the Small Holdings Act, 1892,[1] the term 'forestry' having been added to the list appearing therein.

HORTICULTURE may be described as the 'cultivation of kitchen-gardens or orchards.'

FORESTRY may be described as 'the art of forming or cultivating forests; the management of growing timber.'

HUSBANDRY may be described as 'the business of a husbandman, comprehending the various branches of agriculture; farming; the tillage and culture of land.'

From the wide meaning given to the word 'agriculture,' it will be seen that all workmen who are employed in connection with the cultivation of land, orchards, kitchen-gardens, or forests, or with the keeping and breeding of live stock, come within the provisions of this Act.

EMPLOYMENT IN AGRICULTURE.—The Act applies to 'employment of workmen in agriculture.' There are no words confining the employment to a particular locality, as the words 'on, in, or about,' do in the principal Act. These words have been held to apply only to employment in close proximity and physical contiguity to the premises where the work is carried on (see notes on p. 89), but such a limitation does not appear to be applicable to the employment referred to in this Act. The words 'employment in agriculture' are not words of locality; they would appear to include such work as the carting of hay, no matter how far distant from the farm the workman is at the time of the accident. Owing to the loss of locality which now attaches to the meaning of the words 'on, in, or about,' the farmer, as pointed out by the *Law Times*, 'will have more reason to regret an accident in a distant market, than the purchaser who buys his produce has in the

[1] 55 and 56 Vict. c. 31.

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conveyance of the same to his factory or warehouse (110 Law Times 129). Sec. 3.

ANY EMPLOYER WHO HABITUALLY EMPLOYS.—By Sec. 1 (1) the Act only applies to employers 'who habitually employ one or more workmen in such employment.' This limitation was inserted in the Act to protect small classes of employers who are often themselves no better off than their workmen. If the application of the Act was not limited in this way, the result would be to cast responsibility upon a large number of very small farmers, who might have to compensate men no worse off than themselves. This would be an injustice, as farmers on a small scale rarely employ men to assist them in their agricultural work; they only become casual employers for short periods of the year, and the Act has therefore purposely protected them from a liability which few, if any of them, would be able to bear.

It may often happen that a farmer may be habitually assisted in his agricultural work by his sons, and may only occasionally employ hired labour. Would such a farmer be an employer within the meaning of this Act? It is submitted that he would, because a man assisted by his sons ought to be on the same footing as a man assisted by hired labour. If the work to be performed is such that it is necessary for the farmer to have habitual assistance, the Act intends to protect all workmen engaged on that work, whether the habitual assistance he receives is rendered by members of his own family or by outside hired labour.

MEANING OF 'HABITUALLY.'—It was admitted when the provisions of this Act were being discussed in the House of Commons, that there was a good deal to be said in favour of the criticism of the word 'habitually,' but that word was nevertheless inserted, as the promoters of the measure confessed that they had not been able to find a better word. The Legislature clearly intended to include within the Act agricultural work which is of such importance and magnitude that it is necessary to regularly employ hired labour thereon, but to exclude all agricultural work of a small description, which can be carried on from year to year without any regular assistance, even though it may be occasionally necessary to

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obtain help; but though the intention is clear, it may often be difficult to determine whether a particular employer does 'habitually' employ one or more workmen.

Many small farmers and agriculturalists employ men regularly at certain periods of the year, *e.g.* at harvest time. Could they be said to 'habitually' employ one or more workmen? The Attorney-General was asked this question when the Bill was before the House of Commons, and in reply he said he did not think that occasional employment at a particular time of the year, even if it happened every year, would constitute 'habitual' employment within the meaning of this sub-section.

RESTRICTION ON LIABILITY OF EMPLOYER—By Sec. 1 (2), where an employer agrees with a contractor for the execution by or under that contractor of any work in agriculture, Sec. 4 of the Workmen's Compensation Act, 1897,[1] is to apply as if that employer were an undertaker. That is to say, the employer is made liable for injuries to workmen in the service of a contractor with him, whereas, apart from this sub-section, a workman in the service of an independent contractor would have to look to the contractor, and to him alone, for compensation (see note under Sec. 4 of the Workmen's Compensation Act, 1897, at p. 60).

But there is an important difference between this sub-section and Sec. 4 of the Workmen's Compensation Act, 1897.[1] Under the latter section the undertaker is always liable in the first instance, and is liable whether the contractor is liable or not, if he would have been liable had he been an employer to whom that Act applies. But by this Act, in certain circumstances, the contractor is alone liable to pay compensation to any workman employed by him in agriculture.

If the contractor provides and uses machinery driven by mechanical power for the purpose of threshing, ploughing, or other agricultural work, he and he alone becomes liable to any workman employed by him. This is a useful provision, as many farmers employ such contractors to carry out such work by means of machinery, and the contractors employ their own skilled men to attend to it. Under such circum-

[1] 60 and 61 Vict. c. 37.

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stances, the farmer is not, owing to this sub-section, liable for injuries to those employed by the contractor on such work. Sec. 3.

For what is meant by 'mechanical power,' see note on p. 137.

WORKMAN EMPLOYED PARTLY IN OTHER WORK.—Sec. 1 (3) protects workmen, who, though mainly employed in agriculture, are partly or occasionally employed in other work, and provides that the Act shall apply to them, although at the time of the accident which causes the injury they may be employed in such other work. This sub-section will very much restrict the defence frequently raised under the Act of 1897, that the injury was not caused by accident 'arising out of and in the course of the employment.' (See note under Sec. 1 (1), pp. 7-15).

The words 'other work' are in no way limited, so that it would appear that the 'other work' need not in any way be connected with the work of agriculture. If this view be correct, it will include odd jobs done about a house by a gardener, in the service of a man who habitually employs one or more workmen in agriculture. Consequently it will have far reaching effects. As pointed out by the *Law Times*, the section will make the employer liable 'to a poultry woman or farm hand who waits at table and falls down the back stairs with the dinner tray' (110 Law Times 561.)

DEFENCES OPEN TO EMPLOYER.—The defence open to an employer under the Workmen's Compensation Act, 1897,[1] that the injury was attributable to the serious and wilful misconduct of the workman, will also be open to an employer under this Act (see note under Sec. 1 (2) (*c*), at p. 25). The accident, it would also appear, must 'arise out of and in the course of the employment' (see p. 7), and must disable the workman for a period of at least two weeks (see p. 17). In fact, the provisions of the Workmen's Compensation Act, 1897,[1] will apply to this Act, except where, as in Sec. 1 (2), they are expressly excluded. Consequently the notice to be given, the procedure to be adopted, the amount of compensation recoverable, and other matters, will be regulated by the provisions of the former Act and the rules made thereunder,

[1] 60 and 61 Vict. c. 37.

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which will apply generally for the carrying into effect of this Act.

This Act came into operation on 1st July 1901. The provision that the Act should not come into operation until 1st July 1901 was inserted because of the difficulty that there was in bringing home to the smaller employers the liabilities which they would incur. The President of the Board of Agriculture undertook to meet this difficulty by circulating the fullest information as to the effect of the measure.

In pursuance of this undertaking the Board of Agriculture have issued instructions on the matter, and employers of labour who are interested in the new Act should apply by unstamped letter to the Secretary of the Board of Agriculture, 4 Whitehall Place, London, S.W., for a copy of the instructions.

Reference is made to and extracts taken from these instructions in an article appearing in the *Times* of October 2, 1900.

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APPENDIX A

WORKMEN'S COMPENSATION ACT, 1897

(60 AND 61 VICT. c. 37)

An Act to amend the Law with respect to Compensation to Workmen for accidental Injuries suffered in the course of their Employment. [6th August 1897.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Liability of certain employers to workmen for injuries.

1.—(1.) If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act.

(2.) Provided that:—

(a) The employer shall not be liable under this Act in respect of any injury which does not disable the workman for a period of at least two weeks from earning full wages at the work at which he was employed;

(b) When the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act, or take the same proceedings as were open to him before the commencement of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid;

(c) If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed.

(3.) If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the employment is one to which this Act applies), or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the First Schedule

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to this Act, be settled by arbitration, in accordance with the Second Schedule to this Act.

(4.) If, within the time hereinafter in this Act limited for taking proceedings, an action is brought to recover damages independently of this Act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the court in which the action is tried shall, if the plaintiff shall so choose, proceed to assess such compensation, and shall be at liberty to deduct from such compensation all the costs which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this Act.

In any proceeding under this sub-section, when the court assesses the compensation, it shall give a certificate of the compensation it has awarded and the directions it has given as to the deduction for costs, and such certificate shall have the force and effect of an award under this Act.

(5.) Nothing in this Act shall affect any proceeding for a fine under the enactments relating to mines or factories, or the application of any such fine, but if any such fine, or any part thereof, has been applied for the benefit of the person injured, the amount so applied shall be taken into account in estimating the compensation under this Act.

Time for taking proceedings.

2.—(1.) Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death. Provided always that the want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings, if it is found in the proceedings for settling the claim that the employer is not prejudiced in his defence by the want, defect, or inaccuracy, or that such want, defect, or inaccuracy was occasioned by mistake or other reasonable cause.

(2.) Notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or, if there is more than one employer, upon one of such employers.

(3.) The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served.

(4.) The notice may also be served by post by a registered letter addressed to the person on whom it is to be served at his last known place of residence or place of business, and if served by post shall be deemed to have been served at the time when the letter containing the same would have been delivered in the ordinary course of post, and in proving the service of such notice it shall be sufficient to prove that the notice was properly addressed and registered.

(5.) Where the employer is a body of persons corporate or unincorporate, the notice may also be served by delivering the same at, or by sending it by post in a registered letter addressed to the employer at, the office, or, if there be more than one office, any one of the offices of such body.

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3.—(1.) If the Registrar of Friendly Societies, after taking steps to ascertain the views of the employer and workmen, certifies that any scheme of compensation, benefit, or insurance for the workmen of an employer in any employment, whether or not such scheme includes other employers and their workmen, is on the whole not less favourable to the general body of workmen and their dependants than the provisions of this Act, the employer may, until the certificate is revoked, contract with any of those workmen that the provisions of the scheme shall be substituted for the provisions of this Act, and thereupon the employer shall be liable only in accordance with the scheme, but, save as aforesaid, this Act shall apply notwithstanding any contract to the contrary made after the commencement of this Act. Contracting out.

(2.) The registrar may give a certificate to expire at the end of a limited period not less than five years.

(3.) No scheme shall be so certified which contains an obligation upon the workmen to join the scheme as a condition of their hiring.

(4.) If complaint is made to the Registrar of Friendly Societies by or on behalf of the workmen of any employer that the provisions of any scheme are no longer on the whole so favourable to the general body of workmen of such employer and their dependants as the provisions of this Act, or that the provisions of such scheme are being violated, or that the scheme is not being fairly administered, or that satisfactory reasons exist for revoking the certificate, the registrar shall examine into the complaint, and, if satisfied that good cause exists for such complaint, shall, unless the cause of complaint is removed, revoke the certificate.

(5.) When a certificate is revoked or expires, any moneys or securities held for the purpose of the scheme shall be distributed as may be arranged between the employer and workmen, or as may be determined by the Registrar of Friendly Societies in the event of a difference of opinion.

(6.) Whenever a scheme has been certified as aforesaid, it shall be the duty of the employer to answer all such inquiries and to furnish all such accounts in regard to the scheme as may be made or required by the Registrar of Friendly Societies.

(7.) The Chief Registrar of Friendly Societies shall include in his annual report the particulars of the proceedings of the registrar under this Act.

4. Where, in an employment to which this Act applies, the undertakers as hereinafter defined contract with any person for the execution by or under such contractor of any work, and the undertakers would, if such work were executed by workmen immediately employed by them, be liable to pay compensation under this Act to those workmen in respect of any accident arising out of and in the course of their employment, the undertakers shall be liable to pay to any workman employed in the execution of the work any compensation which is payable to the workman (whether under this Act or in respect of personal negligence or wilful act independently of this Act) by such contractor, or would be so payable if such contractor were an employer to whom this Act applies. Sub-contracting.

Provided that the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of this section.

This section shall not apply to any contract with any person for the execution by or under such contractor of any work which is merely ancillary or incidental to, and is no part of, or process in, the trade or business carried on by such undertakers respectively.

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Compensation to workmen in case of bankruptcy of employer.

5.—(1.) Where any employer becomes liable under this Act to pay compensation in respect of any accident, and is entitled to any sum from insurers in respect of the amount due to a workman under such liability, then in the event of the employer becoming bankrupt, or making a composition or arrangement with his creditors, or if the employer is a company of the company having commenced to be wound up, such workman shall have a first charge upon the sum aforesaid for the amount so due, and the judge of the county court may direct the insurers to pay such sum into the Post Office Savings Bank in the name of the registrar of such court, and order the same to be invested or applied in accordance with the provisions of the First Schedule hereto with reference to the investment in the Post Office Savings Bank of any sum allotted as compensation, and those provisions shall apply accordingly.

(2.) In the application of this section to Scotland, the words 'have a first charge upon' shall mean 'be preferentially entitled to.'

Recovery of damages from stranger.

6. Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the workman may, at his option, proceed, either at law against that person to recover damages, or against his employer for compensation under this Act, but not against both, and if compensation be paid under this Act, the employer shall be entitled to be indemnified by the said other person.

Application of Act and definitions.

7.—(1.) This Act shall apply only to employment by the undertakers as hereinafter defined, on or in or about a railway, factory, mine, quarry, or engineering work, and to employment by the undertakers as hereinafter defined on in or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished, or on which machinery driven by steam, water, or other mechanical power, is being used for the purpose of the construction, repair, or demolition thereof.

(2.) In this Act—

'Railway' means the railway of any railway company to which the Regulation of Railways Act, 1873,[1] applies, and includes a light railway made under the Light Railways Act, 1896;[2] and 'railway' and 'railway company' have the same meaning as in the said Acts of 1873 and 1896:

'Factory' has the same meaning as in the Factory and Workshop Acts, 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery, or plant, to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895,[3] and every laundry worked by steam, water, or other mechanical power:

'Mine' means a mine to which the Coal Mines Regulation Act, 1887,[4] or the Metalliferous Mines Regulation Act, 1872,[5] applies:

'Quarry' means a quarry under the Quarries Act, 1894:[6]

'Engineering work' means any work of construction or alteration or repair of a railroad, harbour, dock, canal, or sewer, and includes any

[1] 36 and 37 Vict. c. 48.
[2] 59 and 60 Vict. c. 48.
[3] 58 and 59 Vict. c. 37.
[4] 50 and 51 Vict. c. 58.
[5] 35 and 36 Vict. c. 77.
[6] 57 and 58 Vict. c. 42.

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other work for the construction, alteration, or repair of which machinery driven by steam, water, or other mechanical power is used:

'Undertakers' in the case of a railway means the railway company; in the case of a factory, quarry, or laundry means the occupier thereof within the meaning of the Factory and Workshop Acts, 1878 to 1895; in the case of a mine means the owner thereof within the meaning of the Coal Mines Regulation Act, 1887,[1] or the Metalliferous Mines Regulation Act, 1872,[2] as the case may be; and in the case of an engineering work means the person undertaking the construction, alteration, or repair; and in the case of a building means the persons undertaking the construction, repair, or demolition:

'Employer' includes any body of persons corporate or unincorporate and the legal personal representative of a deceased employer:

'Workman' includes every person who is engaged in an employment to which this Act applies, whether by way of manual labour or otherwise, and whether his agreement is one of service or apprenticeship or otherwise, and is expressed or implied, is oral or in writing. Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependants, or other person to whom compensation is payable:

'Dependants' means—

(a) in England and Ireland, such members of the workman's family specified in the Fatal Accidents Act, 1846,[3] as were wholly or in part dependent upon the earnings of the workman at the time of his death; and

(b) in Scotland, such of the persons entitled according to the law of Scotland to sue the employer for damages or solatium in respect of the death of the workman, as were wholly or in part dependent upon the earnings of the workman at the time of his death.

(3.) A workman employed in a factory which is a shipbuilding yard shall not be excluded from this Act by reason only that the accident arose outside the yard in the course of his work upon a vessel in any dock, river or tidal water near the yard.

Application to workmen in employment of Crown.

8.—(1.) This Act shall not apply to persons in the naval or military service of the Crown, but otherwise shall apply to any employment by or under the Crown to which this Act would apply if the employer were a private person.

(2.) The Treasury may, by warrant laid before Parliament, modify for the purposes of this Act their warrant made under section one of the Superannuation Act, 1887,[4] and notwithstanding anything in that Act, or any such warrant, may frame a scheme with a view to its being certified by the Registrar of Friendly Societies under this Act.

Provision as to existing contracts.

9. Any contract existing at the commencement of this Act, whereby a workman relinquishes any right to compensation from the employer for personal injury arising out of and in the course of his employment, shall

[1] 50 and 51 Vict. c. 58.
[2] 35 and 36 Vict. c. 77.
[3] 9 and 10 Vict. c. 93.
[4] 50 and 51 Vict. c. 67

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not, for the purposes of this Act, be deemed to continue after the time at which the workman's contract of service would determine if notice of the determination thereof were given at the commencement of this Act.

Commencement of Act and short title.

10.—(1.) This Act shall come into operation on the first day of July one thousand eight hundred and ninety-eight.

(2.) This Act may be cited as the Workmen's Compensation Act, 1897.

FIRST SCHEDULE

SCALE AND CONDITIONS OF COMPENSATION

Scale

(1.) The amount of compensation under this Act shall be—

(*a*) where death results from the injury—

(i) if the workman leaves any dependants wholly dependent upon his earnings at the time of his death, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of one hundred and fifty pounds, whichever of those sums is the larger, but not exceeding in any case three hundred pounds, provided that the amount of any weekly payments made under this Act shall be deducted from such sum, and if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer;

(ii) if the workman does not leave any such dependants, but leaves any dependants in part dependent upon his earnings at the time of his death, such sum, not exceeding in any case the amount payable under the foregoing provisions, as may be agreed upon, or, in default of agreement, may be determined, on arbitration under this Act, to be reasonable and proportionate to the injury to the said dependants; and

(iii) if he leaves no dependants, the reasonable expenses of his medical attendance and burial, not exceeding ten pounds;

(*b*) where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one p und.

(2.) In fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident, and to any payment not being wages which he may receive from the employer in respect of his injury during the period of his incapacity.

(3.) Where a workman has given notice of an accident, he shall, if so

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required by the employer, submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, and if he refuses to submit himself to such examination, or in any way obstructs the same, his right to compensation, and any proceeding under this Act in relation to compensation, shall be suspended until such examination takes place.

(4.) The payment shall, in case of death, be made to the legal personal representative of the workman, or, if he has no legal personal representative, to or for the benefit of his dependants, or, if he leaves no dependants, to the person to whom the expenses are due; and if made to the legal personal representative, shall be paid by him to or for the benefit of the dependants or other person entitled thereto under this Act.

(5.) Any question as to who is a dependant, or as to the amount payable to each dependant, shall, in default of agreement, be settled by arbitration under this Act.

(6.) The sum allotted as compensation to a dependant may be invested or otherwise applied for the benefit of the person entitled thereto, as agreed, or as ordered by the committee or other arbitrator.

(7.) Any sum which is agreed or is ordered by the committee or arbitrator to be invested may be invested in whole or in part in the Post Office Savings Bank by the registrar of the county court in his name as registrar.

(8.) Any sum to be so invested may be invested in the purchase of an annuity from the National Debt Commissioners through the Post Office Savings Bank, or be accepted by the Postmaster-General as a deposit in the name of the registrar as such, and the provisions of any statute or regulations respecting the limits of deposits in savings bank, and the declaration to be made by a depositor, shall not apply to such sums.

(9.) No part of any money invested in the name of the registrar of any county court in the Post Office Savings Bank under this Act shall be paid out, except upon authority addressed to the Postmaster-General by the Treasury or by the judge of the county court.

(10.) Any person deriving any benefit from any moneys invested in a post office savings bank under the provisions of this Act may, nevertheless, open an account in a post office savings bank or in any other savings bank in his own name without being liable to any penalties imposed by any statute or regulations in respect of the opening of accounts in two savings banks, or of two accounts in the same savings bank.

(11.) Any workman receiving weekly payments under this Act shall, if so required by the employer, or by any person by whom the employer is entitled under this Act to be indemnified, from time to time submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, or such other person; but if the workman objects to an examination by that medical practitioner, or is dissatisfied by the certificate of such practitioner upon his condition when communicated to him, he may submit himself for examination to one of the medical practitioners appointed for the purposes of this Act, as mentioned in the Second Schedule to this Act, and the certificate of that medical practitioner as to the condition of the workman at the time of the examination shall be given to the employer and workman, and shall be conclusive evidence of that condition. If the workman refuses to submit himself to such examination, or in any way obstructs the same, his right to such weekly payments shall be suspended until such examination has taken place.

(12.) Any weekly payment may be reviewed at the request either of the

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employer or of the workman, and on such review may be ended, diminished or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act.

(13.) Where any weekly payment has been continued for not less than six months, the liability therefor may, on the application by or on behalf of the employer, be redeemed by the payment of a lump sum, to be settled, in default of agreement, by arbitration under this Act, and such lump sum may be ordered by the committee or arbitrator to be invested or otherwise applied as above mentioned.

(14.) A weekly payment, or a sum paid by way of redemption thereof, shall not be capable of being assigned, charged, or attached, and shall not pass to any other person by operation of law, nor shall any claim be set off against the same.

(15.) Where a scheme certified under this Act provides for payment of compensation by a friendly society, the provisions of the proviso to the first sub-section of section eight, section sixteen, and section forty-one of the Friendly Societies Act, 1896,[1] shall not apply to such society in respect of such scheme.

(16.) In the application of this schedule to Scotland, the expression 'registrar of the county court' means 'sheriff clerk of the county,' and 'judge of the county court' means 'sheriff.'

(17.) In the application of this Act to Ireland, the provisions of the County Officers and Courts (Ireland) Act, 1877,[2] with respect to money deposited in the Post Office Savings Bank under that Act, shall apply to money invested in the Post Office Savings Bank under this Act.

SECOND SCHEDULE

ARBITRATION

The following provisions shall apply for settling any matter which under this Act is to be settled by arbitration :—

(1.) If any committee, representative of an employer and his workmen, exists with power to settle matters under this Act in the case of the employer and workmen, the matter shall, unless either party objects, by notice in writing sent to the other party before the committee meet to consider the matter, be settled by the arbitration of such committee, or be referred by them in their discretion to arbitration as hereinafter provided.

(2.) If either party so objects, or there is no such committee, or the committee so refers the matter or fails to settle the matter within three months from the date of the claim, the matter shall be settled by a single arbitrator agreed on by the parties, or in the absence of agreement by the county court judge, according to the procedure prescribed by rules of court, or if in England the Lord Chancellor so authorises, according to the like procedure, by a single arbitrator appointed by such county court judge.

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[1] 59 and 60 Vict. c. 25. [2] 40 and 41 Vict. c. 56.

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(3.) Any arbitrator appointed by the county court judge shall, for the purposes of this Act, have all the powers of a county court judge, and shall be paid out of moneys to be provided by Parliament in accordance with regulations to be made by the Treasury.

(4.) The Arbitration Act, 1889,[1] shall not apply to any arbitration under this Act; but an arbitrator may, if he thinks fit, submit any question of law for the decision of the county court judge, and the decision of the judge on any question of law, either on such submission, or in any case where he himself settles the matter under this Act, shall be final, unless within the time and in accordance with the conditions prescribed by rules of the Supreme Court either party appeals to the Court of Appeal; and the county court judge, or the arbitrator appointed by him, shall, for the purpose of an arbitration under this Act, have the same powers of procuring the attendance of witnesses and the production of documents as if the claim for compensation had been made by plaint in the county court.

(5.) Rules of court may make provision for the appearance in any arbitration under this Act of any party by some other person.

(6.) The costs of and incident to the arbitration and proceedings connected therewith shall be in the discretion of the arbitrator. The costs, whether before an arbitrator or in the county court, shall not exceed the limit prescribed by rules of court, and shall be taxed in manner prescribed by those rules.

(7.) In the case of the death or refusal or inability to act of an arbitrator, a Judge of the High Court at Chambers may, on the application of any party, appoint a new arbitrator.

(8.) Where the amount of compensation under this Act shall have been ascertained, or any weekly payment varied, or any other matter decided, under this Act, either by a committee or by an arbitrator or by agreement, a memorandum thereof shall be sent, in manner prescribed by rules of court, by the said committee or arbitrator, or by any party interested, to the registrar of the county court for the district in which any person entitled to such compensation resides, who shall, subject to such rules, on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the said memorandum shall for all purposes be enforceable as a county court judgment. Provided that the county court judge may at any time rectify such register.

(9.) Where any matter under this Act is to be done in a county court, or by to or before the judge or registrar of a county court, then, unless the contrary intention appear, the same shall, subject to rules of court, be done in, or by to or before the judge or registrar of, the county court of the district in which all the parties concerned reside, or if they reside in different districts the district in which the accident out of which the said matter arose occurred, without prejudice to any transfer in manner provided by rules of court.

(10.) The duty of a county court judge under this Act, or of an arbitrator appointed by him, shall, subject to rules of court, be part of the duties of the county court, and the officers of the court shall act accordingly, and rules of court may be made both for any purpose for which this Act authorises rules of court to be made, and also generally for carrying into

[1] 52 and 53 Vict. c. 49.

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effect this Act so far as it affects the county court, or an arbitrator appointed by the judge of the county court, and proceedings in the county court or before any such arbitrator, and such rules may, in England, be made by the five judges of the county courts appointed for the making of rules under section one hundred and sixty-four of the County Courts Act, 1888,[1] and when allowed by the Lord Chancellor, as provided by that section, shall have full effect without any further consent.

(11.) No court fee shall be payable by any party in respect of any proceeding under this Act in the county court prior to the award.

(12.) Any sum awarded as compensation shall be paid on the receipt of the person to whom it is payable under any agreement or award, and his solicitor or agent shall not be entitled to recover from him, or to claim a lien on, or deduct any amount for costs from, the said sum awarded, except such sum as may be awarded by the arbitrator or county court judge, on an application made by either party to determine the amount of costs to be paid to the said solicitor or agent, such sum to be awarded subject to taxation and to the scale of costs prescribed by rules of court.

(13.) The Secretary of State may appoint legally qualified medical practitioners for the purpose of this Act, and any committee, arbitrator, or judge may, subject to regulations made by the Secretary of State and the Treasury, appoint any such practitioner to report on any matter which seems material to any question arising in the arbitration; and the expense of any such medical practitioner shall, subject to Treasury regulations, be paid out of moneys to be provided by Parliament.

(14.) In the application of this schedule to Scotland—

(*a*) 'Sheriff' shall be substituted for 'county court judge,' 'sheriff court' for 'county court,' 'action' for 'plaint,' 'sheriff clerk' for 'registrar of the county court,' and 'act of sederunt' for 'rules of court':

(*b*) Any award or agreement as to compensation under this Act may be competently recorded for execution in the books of council and session or sheriff court books, and shall be enforceable in like manner as a recorded decree arbitral:

(*c*) Any application to the sheriff as arbitrator shall be heard, tried, and determined summarily in the manner provided by the fifty-second section of the Sheriff Courts (Scotland) Act, 1876,[2] save only that parties may be represented by any person authorised in writing to appear for them and subject to the declaration that it shall be competent to either party within the time and in accordance with the conditions prescribed by act of sederunt to require the sheriff to state a case on any question of law determined by him, and his decision thereon in such case may be submitted to either division of the Court of Session, who may hear and determine the same finally, and remit to the sheriff with instruction as to the judgment to be pronounced.

15.) Paragraphs four and seven of this schedule shall not apply to Scotland.

(16.) In the application of this schedule to Ireland, the expression 'county court judge' shall include the recorder of any city or town.

[1] 51 and 52 Vict. c. 43.

[2] 39 and 40 Vict. c. 70.

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APPENDIX B

THE WORKMEN'S COMPENSATION RULES, 1898 DATED MAY 27, 1898

EXPLANATORY MEMORANDUM

The accompanying Rules and Forms have been framed under paragraph 10 of the second schedule to the Act, which provides that Rules of Court may be made for any purpose for which the Act authorises Rules of Court to be made, and also generally for carrying the Act into effect so far as it affects the County Court, or an arbitrator appointed by the judge, and proceedings in the County Court or before such arbitrator, and that such Rules may in England be made by the County Court Rules Committee, and, when allowed by the Lord Chancellor, shall have full effect without any further consent.

The following provisions of the Act have to be considered :—

Act.

Sect. 1, *sub-sect.* 3. Questions to be settled by arbitration.

Sect. 1, *sub-sect.* 4. Certificate of Court in which an action is brought to have effect of award.

Sect. 2. Notice of accident, and claim for compensation.

Sect. 4. Employer when entitled to be indemnified by contractor.

Sect. 5. Workman entitled to first charge on sum payable by insurers to employer in respect of compensation payable by him, where the employer becomes bankrupt, etc.; payment of such sum into Court.

Sect. 6. Employer when entitled to be indemnified by stranger.

Schedule 1.

Par. 1. (*a*) (ii). Settlement by arbitration of sum payable to dependants of deceased workman.

Par. 3. Refusal of workman to submit to examination.

Par. 5. Arbitration as to who are dependants, and amount payable to each dependant.

Par. 6. Investment and application of compensation allotted to dependants.

Par. 9. Payment out of Court of money invested in name of Registrar.

Par. 11. Suspension of payments on refusal to submit to examination.

Par. 12. Review of weekly payments.

Par. 13. Redemption of weekly payments; investment and application of redemption money.

Schedule 2.

Par. 1. Reference to arbitration by committee representative of employer and workmen.

Par. 2. Settlement of matters—

by judge, according to procedure prescribed by Rules; or, if Lord Chancellor so authorises, according to like procedure, by arbitrator appointed by judge.

Par. 3. Arbitrator so appointed to have powers of judge.

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Par. 4. Arbitration Act, 1889, not to apply:
Arbitrator may submit question of law for decision of judge:
Decision of judge on question of law submitted, or where he settles matter, to be final, unless either party appeals under Rules of Supreme Court.
Power of judge or arbitrator to procure attendance of witnesses and production of documents.

Par. 5. Rules may provide for appearance of parties in *any* arbitration.

Par. 6. Costs before arbitrator or in Court not to exceed limit prescribed by Rules, and to be taxed in manner prescribed.

Par. 8. Memorandum of decision of committee, arbitrator, or by agreement to be sent, as prescribed by Rules, to Registrar of County Court, and to be registered there and enforceable as a judgment. Power of judge to rectify register.

Par. 9. What Court to have jurisdiction:
Transfer of matters as prescribed by Rules.

Par. 10. Duties of judge or arbitrator to be part of duties of Court:
General power of making Rules.

Par. 12. No deduction from or lien on compensation for costs of solicitor or agent, or right to recover such costs, except as awarded by arbitrator or judge on application by either party, subject to taxation and scale prescribed by Rules.

Par. 13. Appointment of medical referees to report on matters arising in arbitrations.

It is apprehended that the Rules Committee have no power to make Rules as to the procedure before a committee or an arbitrator agreed upon by the parties; but paragraphs 4 to 6, 8, 12 and 13 of Schedule 2 appear to apply to such an arbitrator as well as to one appointed by the judge.

The scheme of the Rules is as follows:—

	RULES
1. Preliminary. Effect, construction, etc., of Rules	1
2. Parties to arbitration	2-7
3. Application to Court for settlement of matters by arbitration	8-12
4. Proceedings before judge, including service on respondents, stay of numerous arbitrations to abide event of selected case, notice of defence by respondents, submission by respondents to award, payment into Court, and claim to indemnity under Section 4 or Section 6, or otherwise	13-24
4*a*. Appointment of medical referees; Schedule 2, par. 13	25
5. Award	26
6. Appointment of arbitrator by judge	27
7. Proceedings before arbitrator	28, 29
8. Submission of question of law by arbitrator to judge	30
9. Subsequent arbitration in matter settled by arbitrator	31
10. Appearance of parties; Schedule 2, par. 5	32
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	RULES
15. Costs of solicitor or agent under Schedule 2, par. 12	46, 47
16. Certificate under Section 1, sub-section 4	48
17. Execution	49
18. Suspension of proceedings or weekly payments on refusal of injured workman to submit to medical examination; Schedule 1, pars. 3, 11	50
19. Applications against insurers under Section 5	51-58
20. Application of money ordered to be invested	59
21. Transfer of proceedings	60, 61
22. Filing and service of documents and notices	62
23. Procedure generally	63, 64
24. Record of proceedings. Special register	65
25. Matters, how distinguished	66
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The Rules are intended to apply, as far as possible, the procedure in County Court actions to arbitrations under the Act, with such modifications as seem to be necessary.

Dealing with the Rules in detail :—

Rule 1. Provides for the title, commencement and construction of the Rules.

Rule 2. Prescribes who are to be parties to an application for arbitration, with a special provision as to cases where both the undertakers and a contractor may be liable under section 4.

Rule 3. Provides for the joinder of applicants in accordance with Order III., Rule 1*a*, of the County Court Rules (December 1896).

Rules 4, 5. Provide for applications on behalf of dependants, following the principle of Lord Campbell's Act (The Fatal Accidents Act, 1846, 9 and 10 Vict. c. 93, and amending Act, 27 and 28 Vict. c. 95).

Rule 6. Provides for applications where deceased workman leaves no dependants. Schedule 1, par. (1.) (*a*) (iii).

Rule 7. Provides for persons under disability, partners, and the representation of numerous parties having the same interest.

Rules 8-12. Provide that application for arbitration shall be made by filing a request, following the procedure on an appeal under the Agricultural Holdings Act, or a petition in equity, rather than that on the commencement of an action; such request to contain particulars of the claim. Full forms are given in the Appendix.

Rule 13. Provides for fixing a day and place for the arbitration, following, as to the place, the Admiralty Rules in force in the County Courts. Order XXXIXB., Rules 1, 2.

Rule 14. Provides for notice to the applicant and respondents.

Rule 15. Provides for service on the respondents, either by a bailiff or by the applicant or his solicitor, and adopts the provisions of section 2 of the Act as to the service of notice of an accident by registered post.

Rule 16. Provides for the stay of numerous applications for arbitration on claims arising out of the same circumstances, on the employer undertaking to be bound, so far as liability to pay compensation is concerned, by the award in a selected case. (*See* County Court Rules, Order VIII., Rules 2-6.)

Rule 17. Provides for the respondent filing an answer to the claim, and that

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he shall, subject to such answer, be deemed to admit the correctness of the applicant's particulars, and his own liability to make compensation. (*See* County Court Rules, Order X., Rules 9, 10.)

Rule 18. Provides for a respondent submitting to an award, or paying money into Court, and for the proceedings consequent thereon.

Rules 19-23. Deal with claims to indemnity under section 4 or section 6, or otherwise.

The question has been considered, to what extent the third party procedure under Order XI. can be implied in cases in which an employer claims under either of these sections to be entitled to indemnity against a sub-contractor or a stranger; and the Rules are framed on the assumption that it can be only applied for the purpose of providing that a sub-contractor (unless he is himself liable as an employer under the Act), or a stranger, shall not be entitled in any future proceeding to dispute the validity of an award against the employer.

An arbitration under the Act will be a very different thing from an action: and the question whether such a sub-contractor or a stranger is liable to the workman, and is consequently liable under the sections referred to to indemnify the employer, is a very different one from the question whether the employer is liable to the workman.

For instance, such a sub-contractor is apparently liable under section 4 only in case of personal negligence or wilful act, or under the Employers Liability Act: while a stranger would be liable under section 6 only in case of wilful act or negligence: and a sub-contractor sued under the Employers Liability Act would be entitled to any defence open to him under that Act, while a stranger would be entitled to any defence open to him at common law, such defences including contributory negligence on the part of the workman, a very much wider term than the 'serious and wilful misconduct' on which alone an employer can rely under section 1, sub-sect. 2 (*c*); and it is difficult to see how a sub-contractor or stranger can be compelled to submit these questions to the judge or arbitrator, and deprived of his right to have them decided by a jury, or what power the judge or arbitrator has to decide them at or after the arbitration.

The third party procedure is for these reasons expressly limited so as to make it bind the third party only as to the validity of the award against the employer in respect to matters which under the Act the judge or arbitrator has power to decide as between the workman and the employer, and not as to the third party's liability to indemnify the employer.

There seems, however, to be no reason why the judge or arbitrator should not, if the third party and the respondent consent, decide the question of the third party's liability; and provision is therefore made by Rule 22 for the decision of this question by consent.

Rule 23. Provides for claims to indemnity as between respondents, and makes provision for the judge or arbitrator giving effect, independently of any consent to his so doing, to the right of indemnity given by section 4 to an employer who is called upon to pay compensation to a workman in the service of a contractor, in cases where the contractor is joined as a respondent, and it is decided in the arbitration that he is liable under the Act to pay compensation to the workman. In such a case there can be no further question to be tried as between the

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employer and the contractor as to the right to indemnity, which is expressly given by the Statute; and there can be no difficulty in the judge or arbitrator giving effect to such right.

Rule 24. Provides that, subject to the special provisions of the Rules, the procedure in an arbitration shall be the same as in an ordinary County Court action tried by the judge without a jury.

Rule 25. Deals with the appointment of medical referees under paragraph 18 of Schedule 2. Under this paragraph, which applies to the whole of the kingdom, and to all arbitrations, whether before committees, agreed arbitrators, judges, or arbitrators appointed by them, a committee, arbitrator, or judge may appoint a medical referee 'subject to regulations made by the Secretary of State and the Treasury.' Rule 25 provides that medical referees may be appointed by a judge or arbitrator subject to and in accordance with such regulations, and that such regulations, so far as they relate to proceedings in the County Court, or before appointed arbitrators, shall be deemed to be Rules of Court, and shall have effect accordingly.

Rule 26. Provides for the award, and embodies section 7 (*c*) of the Arbitration Act, 1889, as to the correction of errors. Forms of award are given in the Appendix.

Rule 27. Deals with the appointment of an arbitrator by the judge.

Schedule 2, *par.* 2 of the Act, provides that matters referred to the judge shall, if the Lord Chancellor so authorises, be settled by an arbitrator appointed by the judge. The paragraph does not indicate the circumstances in which such authorisation may be given; but it is presumed that the object of the enactment is to enable the Lord Chancellor to grant such authority in cases in which the time of the judge is so fully occupied that he cannot deal with arbitrations himself.

In framing the rule it has been assumed that in Courts where the business is heavy and arbitrations are likely to be numerous, the Lord Chancellor may think it proper to grant a general authority to refer matters under the Act to an arbitrator; and that in other cases he will grant special authorities from time to time as occasion may require.

The Act does not require the arbitrator to possess any special qualifications, and it is therefore provided that any appointment shall be subject to the approval of the Lord Chancellor.

Rules 28, 29. Apply to proceedings before an arbitrator the provisions of the Rules as to proceedings before the judge, with a proviso that where the parties agree, and application is made for an award by consent, such award may be made by the judge, and thereupon the functions of the arbitrator shall cease.

Rule 30. Provides for the statement and hearing of questions of law submitted by an arbitrator to the judge under Schedule 2, paragraph 4. This paragraph seems to apply to an arbitrator selected by the parties as well as to an arbitrator appointed by the judge, and the Rules provide that the submission shall be by special case.

Rule 30 (5). Empowers the judge, if his decision disposes of the whole matter, to make an award himself instead of remitting the case to the arbitrator.

Rule 30 (7). Deals with the costs of a special case.

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Rule 31. Provides that where a matter has been settled by an arbitrator, any subsequent arbitration in the same matter shall, as a rule, be referred to the same arbitrator.

Rule 32. Provides for the appearance of parties under paragraph 5 of Schedule 2. It adopts generally the provisions of section 72 of the County Courts Act, and makes special provision for appearance, by leave of the judge or arbitrator, by an officer of a trade union or other society to which the workman may belong. The rule follows section 72 of the County Courts Act as to costs.

Rule 33. Provides for costs awarded by a judge or an arbitrator being taxed according to the County Court scales of costs: the scale to be determined, where the subject of the award is a weekly payment, by the judge or arbitrator. Paragraph (3) provides that any reasonable offer of compensation may be taken into consideration when dealing with costs; and paragraphs (4) and (5) provide that costs incurred by a workman in submitting to examination by a medical referee under Schedule 1, paragraph 3, or if ordered to so submit himself on a reference under Schedule 2, paragraph 13, may be allowed as costs in the arbitration.

Rule 34. Provides for the taxation by the registrar of costs awarded by an arbitrator agreed on by the parties.

Rule 35. Applies to proceedings under the Act the provisions of sections 120 and 121 of the County Courts Act as to taking and furnishing copies of notes of question of law raised.

Rule 36. Provides for appeals, as to which some Rule of the Supreme Court be required. (*See* Schedule 2, par. 4.)

Rule 37. Provides for the procedure after an appeal has been decided.

Rules 38-44. Provide for the drawing up and transmission to the registrar of the memorandum referred to in paragraph 8 of Schedule 2: for the authentication of such memorandum: for inquiries by the registrar as to its genuineness: and for the proceedings to be taken to procure registration where the genuineness of a memorandum is disputed.

Rule 45. Provides how such proceedings shall be taken, and for proceedings for the rectification of the register.

Rules 46, 47. Provide for the procedure on an application under paragraph 12 of Schedule 2 to determine the amount of costs payable to the solicitor or agent of a person to whom compensation is awarded, and for the registration and enforcement of any order made in favour of such solicitor or agent.

Rule 48. Provides a form of certificate where a County Court proceeds under sub-section 4 of Section 1.

Rule 49. Provides for execution on an award, memorandum, or certificate. Special provision seems necessary as to this, having regard to the fact that the payment ordered may be a weekly one, and may be payable to the workman direct, and not into Court.

Rule 50. Provides for applications for the suspension of proceedings or payments where a workman refuses to submit to medical examination. Schedule 1, paragraphs 3, 11.

Rules 51-57. Provide for applications for the enforcement of the charge given by Section 5 on sums payable by insurers in the event of the bankruptcy, etc., of an employer. They follow in the main the provisions of Order XXVIA. as to garnishee proceedings. Power is given

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by Rule 54 to direct that notice of such proceedings shall be given to the employer or his trustee, etc.

Rule 55. Provides that an insurer who is liable to pay a weekly sum to an employer may be ordered to pay such sum direct to the party entitled to compensation instead of paying into Court; and that in such case the insurers shall have the same right as the employer as to the review or redemption of the weekly payment.

Rule 57. It may well happen that an employer may be liable to pay compensation to several persons, and may be entitled to one sum from insurers in respect of such liability, and that such sum may be insufficient to satisfy the whole amounts payable as compensation. This rule therefore gives the Court power to apportion the sum payable by the insurers among the persons entitled to compensation, and for the purposes of such apportionment to order any weekly payment to be redeemed, and makes provision for the transfer and consolidation of proceedings for this purpose.

Rule 58. Provides for discovery in aid of an application against insurers under Section 5, in accordance with Order XXV., Rule 52.

Rule 59. Deals with the application of money ordered to be invested, and applies Rules 21 and 22 of Order IX.

Rule 60. The provisions of paragraph 8 of the Second Schedule, as to the Court in which a memorandum is to be recorded, and those of paragraph 9, as to the Court in which proceedings are to be taken, are not identical; and it may well happen that where a memorandum has been recorded under paragraph 8, and it becomes necessary to take subsequent proceedings with reference to the subject matter of such memorandum, such proceedings may have under paragraph 9 to be taken in some other Court than that in which the memorandum has been recorded. This rule therefore provides that in such cases a certified copy of the memorandum shall be filed and recorded in the Court in which the subsequent proceedings are to be taken.

Rule 61. Provides generally for the transfer of proceedings from one Court to another. (*See* Schedule 2, paragraph 9.)

Rule 62. Provides generally for the filing and service of documents and notices, and provides that service may in any case be effected by the party or his solicitor, and that such service may be effected by registered post.

Rule 63. Applies the provisions of the County Court Rules as to service, etc., where parties act by solicitors, and as to substituted service and notice in lieu of service.

Rule 64. Provides for the application of County Court procedure in cases not specially provided for.

Rule 65. Provides for the record of all proceedings in the Court books and in the special register.

Paragraph (*f*) provides for the recording of certificates given under sub-section 4 of Section 1, either by the Court in which the register is kept or by any other Court.

Rule 66. Provides how matters under the Act shall be distinguished.

Rule 67. Provides for forms, an Appendix of which is annexed to the Rules.

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STATUTORY RULES AND ORDERS, 1898

THE WORKMEN'S COMPENSATION RULES, 1898. DATED MAY 27, 1898

AS AMENDED BY THE WORKMEN'S COMPENSATION RULES, 1899

Preliminary.

Effect, short title, commencement, and construction of Rules.

1. (1.) The following Rules shall have effect under the Workmen's Compensation Act, 1897[1] (in these Rules referred to as the Act), with reference to any matter or proceeding for the regulation of which Rules of Court may be made under the Act, and generally for carrying the Act into effect so far as it affects the County Court or an arbitrator appointed by the judge of the County Court, and proceedings in the County Court or before any such arbitrator.

(2.) These Rules may be cited as the Workmen's Compensation Rules, 1898, and shall come into operation on the first day of July one thousand eight hundred and ninety-eight.

(3.) The Interpretation Act, 1889,[2] shall apply for the purpose of the interpretation of these Rules as it applies for the purpose of the interpretation of an Act of Parliament.

(4.) These Rules shall also be read and construed with the County Court Rules, 1889, and the County Court Rules of subsequent date amending the same; and any Order and Rule referred to by number in these Rules shall mean the Order and Rule so numbered in the County Court Rules, 1889, or in any County Court Rules of subsequent date, as the case may be.

Parties to Arbitration before Judge or Arbitrator appointed by Judge.

Parties to arbitration. [*Conf.* Order XL., Rule 1; Order XIV., Rule 2.]

2. (1.) When application is made for the settlement by the judge, or by an arbitrator appointed by the judge, of any matter which under the Act is to be settled by arbitration, the party making such application shall be called 'the applicant'; and, subject to these rules, all other persons whose presence at the arbitration may be necessary to enable the judge or arbitrator effectively and completely to adjudicate upon and settle all the questions involved shall be made parties to the application, and shall be called 'the respondents.'

(2.) In any case in which both the undertakers as defined by the Act and a contractor with them are alleged to be liable to pay compensation under the Act, the Applicant may at his option make both the undertakers and the contractor, or either of them, respondents.

[According to the decisions of the Court of Appeal in *Cass* v. *Butler* and *Cooper* v. *Davenport—Winstanley, Third Party*, a contractor with an undertaker cannot himself be an undertaker, and consequently cannot be liable to pay compensation under this Act. (*See* note under Sect. 4 at p. 65.)]

[1] 60 and 61 Vict. c. 37. [2] 52 and 53 Vict. c. 63.

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3. More persons than one may be joined as applicants in one arbitration, in any case in which such persons might be joined in one action as plaintiffs under Order III., Rule 1a, of the County Court Rules (Rule 1 of the County Court Rules, December 1896); and that rule, and Rules 18 and 19 of Order XLIV., shall, with the necessary modifications, apply to any such arbitration.

Joinder of applicants. [*Conf.* Order III., Rule 1a (Rule 1 of December, 1896).] Order XLIV., Rules 18, 19.

[The rules mentioned are the following:—

ORDER III. RULE 1a.

All persons may be joined in one action as plaintiffs in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where, if such persons brought separate actions, any common question of law or fact would arise. Provided that if upon the application of any defendant it shall appear that such joinder may embarrass or delay the trial, the judge may order separate trials, or make such other order as may be expedient. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to any extra costs occasioned by so joining any person who shall not be found entitled to relief, unless the court in disposing of the costs of the action shall otherwise direct.

ORDER XLIV. RULES 18 AND 19.

18. Where two or more persons are joined as plaintiffs under Order III., Rule 1, and the negligence, act, or omission which is the cause of action shall be proved, the judgment shall be for all the plaintiffs, but the amount of the sum so awarded for damages, and the costs ordered to be paid to each such plaintiff, shall be found and set forth in the judgment, and the amount of costs awarded in the action shall be ordered to be paid to such person and in such manner as the court may think fit.

19. Should the defendant fail to pay the several amounts of compensation, and the costs awarded in the action, execution against his goods may issue as in an ordinary action, and should the proceeds of the execution be insufficient, after deducting all costs, to pay the whole of the amount awarded, a dividend shall be paid to each plaintiff calculated upon the proportion of the amount which shall have been awarded to the respective plaintiffs to the total amount realised after the deduction of all the costs of the action as aforesaid.]

4. (1.) An application on behalf of the dependants of a deceased workman for the settlement by arbitration of the amount payable as compensation to such dependants shall be made by the legal personal representative, if any, of the deceased workman on behalf of such dependants, and such legal personal representative shall file, as part of the particulars hereinafter mentioned, particulars as to the dependants on whose behalf such application is made.

Application by dependants. [*Conf.* 9 and 10 Vict. c. 93, 27 and 28 Vict. c. 95.]

(2.) If there is no such legal personal representative, the application may be made by the dependants themselves.

(3.) Provided, that if there is any conflict of interest between the de-

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pendants themselves, the application may be made by such legal personal representative on behalf of some only of such dependants, or if there is no such legal personal representative, the application may be made by some only of such dependants, the other dependants in either case being named as respondents.

(4.) In the construction of this rule, the term 'dependants' shall include persons who claim to be dependants, but as to whose claim to rank as dependants any question arises.

[This rule is probably *ultra vires*. Rules were only to be drawn up on matters of procedure, but to compel dependants to claim through the legal personal representative is more than a matter of procedure. If there is a dependant who is entitled to compensation, there is nothing in the Act to prevent him prosecuting his claim in his own name. (*See* notes under Sect. 7 (2) at p. 153.)]

Application by dependants under Act, Sched. 1, par. 5, where amount of compensation agreed or ascertained.

5. (1.) In any case in which the amount payable as compensation to the dependants of a deceased workman has been agreed upon or ascertained, but any question arises as to who are dependants, or as to the amount payable to each dependant, an application for the settlement of such question by arbitration may be made either by the legal personal representative (if any) of the deceased workman on behalf of the dependants or any of them, or if there is no legal personal representative, by such dependants or any of them, against the other dependants, and the persons claiming to be dependants, but as to whose claim to rank as such a question arises; or such application may be made by the persons claiming to be dependants, but as to whose claim to rank as such a question arises, or any of them, against the legal personal representative (if any) of the deceased workman, and the dependants, and such of the persons claiming to be dependants as are not applicants.

(2.) In any such case, if the employer has paid the agreed or ascertained amount of compensation, it shall not be necessary to make him a respondent, but if such compensation or any part thereof is still in his hands he shall be made a respondent.

(3.) In any such case the employer, if made a respondent, may pay the amount of compensation in his hands into court, to be dealt with as the judge or arbitrator shall direct, and thereupon further proceedings against him shall be stayed.

Parties' arbitration as to sum payable for medical attendance and burial. Act, Sched. 1, par. 1 (*a*) (iii).

Apportionment of such sum.

6. (1.) An application for the settlement by arbitration of the sum payable in respect of medical attendance on and the burial of a deceased workman who leaves no dependants shall be made by the legal personal representative, if any, of the deceased workman. If there is no such legal personal representative, the application may be made by any person to whom any such expenses are due. In the latter case, any other person known to the applicant as a person to whom any such expenses are due shall be joined in the application either as applicant or respondent.

(2.) In any case in which application is made for the settlement by arbitration of such amount, the amount awarded, if insufficient for the payment of such expenses in full, shall be apportioned between the persons to whom such expenses are due in such manner as the judge or arbitrator shall direct.

7. The provisions of Rules 7 and 8 of Order III. as to parties suing or

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defending on behalf of other persons having the same interest, and the provisions of the County Court Rules as to persons under disability and partners suing and being sued, shall, with the necessary modifications, apply to proceedings by way of arbitration under the Act.

Parties under disability and partners; representation of parties having the same interest. [Order III., Rules 7, 8, etc.]

[The rules mentioned are the following:—

ORDER III.

7. Where there are numerous persons having the same interest in one action or matter, one or more of such persons may sue or be sued, or may be authorised, at or before the trial, by the judge or registrar to defend in such action or matter on behalf or for the benefit of all parties so interested.

8. Where a defendant desires to defend on behalf or for the benefit of others having the same interest, he shall, within two clear days of the date of service of the summons on him, give notice to the plaintiff of his intention to apply upon a day and hour to be named in such notice to the registrar for leave so to defend, and shall file an affidavit of the facts upon which he relies to obtain such leave, together with the names, addresses, and occupations of such persons, and the registrar may thereupon make an order for the defendant so to defend, and shall add the names to that of the defendant in the plaint and minute-book, and a copy of such order shall be personally served on each of such persons, and notice sent to the plaintiff according to the form in the Appendix: Provided that the plaintiff or any of the persons whose names have been so added may at the trial object to the defendant defending on behalf of all or any of the persons as to whom such order has been made, and the judge may thereupon, if he thinks fit, strike the name of all or any of such persons out of the proceedings and order the defendant to pay such costs as he shall think fit.

The provisions as to persons under disability and partners suing and being sued, will be found in Order III., Rules 9-16 inclusive.]

Application for Arbitration.

Application, how made.

8. An application for the settlement of any matter by arbitration shall be made by the applicant filing with the registrar a request for arbitration, intituled in the matter of the Act and in the matter of the arbitration, which request shall be entered and numbered as a plaint, and shall, with the subsequent proceedings thereon, be recorded in the special register hereinafter mentioned.

Particulars. [*Conf.* Order XL. 2, Order XLI. 3, Order XLIV. 2, 3.]

9. Particulars shall be appended or annexed to the request, containing—

(a) A concise statement of the circumstances under which the application is made, and the relief or order which the applicant claims;

(b) The date of service of notice of the accident on the employer, or, if such notice has not been served, the reason for such omission; and

(c) The full names and addresses of the respondents, and of the applicant and his solicitor, if the proceedings are commenced through a solicitor.

Forms of request and particulars. Forms 1 to 5.

*10. (1.) The request and particulars shall be according to such of the forms in the Appendix as shall be applicable to the case, with such modifications as the nature of the case shall require.

(2.) A copy of the notice of the accident shall be appended or annexed to the particulars. If this rule cannot be complied with, the reason for the omission shall be stated in the particulars.

* See Rule 1, Workmen's Compensation Rules, 1900, in Appendix I.

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Copies for judge and respondents.

11. The applicant shall deliver to the registrar with the request and particulars a copy thereof for the judge or arbitrator, and a copy for each respondent to be served.

Where applicant is illiterate. [*Conf.* Order V., Rule 4a.]

12. Where the applicant is illiterate and unable to furnish the required information in writing, the request and particulars and copies shall be filled up by the registrar's clerk.

Proceedings on Arbitration before Judge.

Fixing Day and Place for Arbitration.

Fixing day and place for arbitration. [*Conf.* Order XL., Rule 5.]

13. (1.) On the filing of a request for arbitration, the registrar shall transmit a copy of the request and particulars to the judge, who shall as soon as conveniently may be (if he decides to settle the matter himself), appoint a day and hour for proceeding with the arbitration. Such day shall be so fixed as to allow the copies of the request and particulars to be served on the respondents at least fifteen clear days before the day so fixed.

(2.) The arbitration shall, subject as hereinafter mentioned, be held at the place at which the Court is held.

[*Conf.* Order XXXIXB., Rules 1, 2.]

(3.) Provided, that the judge may direct that the arbitration shall be held at any other place within the district of the Court, on application in that behalf made by any party to the arbitration, and on such party filing an undertaking to provide at his own expense a place to the satisfaction of the judge in which the arbitration may be held, and to pay the necessary expenses of the judge and officers of the Court attending at such place.

(4.) If such direction is given before the notices mentioned in the next following rule are issued, the registrar shall insert in such notices the place at which the arbitration has been so directed to be held.

(5.) If such direction is given after such notices have been issued, the registrar shall forthwith send notice by post to the parties of the place at which the arbitration has been so directed to be held.

Notice of Day Fixed.

Notice to parties. [*Conf.* Order XXXVIII., Rule 2.]

Forms 6, 7.

***14.** On the day for proceeding with an arbitration being fixed, the registrar shall give or send by post notice in writing to the applicant, stating the place at which and the day and hour on and at which the arbitration will be proceeded with, and shall issue the copies of the request and particulars, under the seal of the court, for service on the respondents, together with notices signed by the registrar himself, and under the seal of the court, stating the place at which and the day and hour on and at which the arbitration will be proceeded with, and that if the respondents do not attend in person or by their solicitors, such order will be made and proceedings taken as the judge may think just and expedient.

Service on Respondents.

Service on respondents. [Order VII., Rule 30.]

15. (1.) The copies and notices mentioned in the last preceding rule may be served—

(*a*) By a bailiff of a court;

or, at the request of the applicant or his solicitor,

(*b*) By the applicant or some clerk or servant in his permanent and exclusive employ; or

* See Rule 2, Workmen's Compensation Rules, 1900, in Appendix I.

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(c) By the applicant's solicitor, or a solicitor acting as agent for such solicitor, or some person in the employ of either of them.

(2.) Service may be effected either in accordance with the rules as to service of default summonses, or by registered post in accordance with the provisions of sub-sections 4 and 5 of Section 2 of the Act with reference to service of notice in respect of an injury, and the provisions of those sub-sections shall apply to such service. Act, Sect. 2, sub-sects. 4, 5.

(3.) Where service is effected otherwise than by a bailiff, a copy of the document served, with the date and mode of service endorsed thereon, shall within three clear days next after the date of service, or such further time as may be allowed by the registrar of the court issuing such document, be delivered or transmitted to such registrar by the applicant or his solicitor. The applicant or his solicitor shall also (unless the respondent files an answer) after the time limited for filing an answer, deliver or transmit to the registrar an affidavit of the service of such document, according to Form 21 in the Appendix to the County Court Rules, with such variations as the circumstances of the case shall require. Where service effected otherwise than by bailiff. [Order VII., Rule 31.]

[The Form referred to is as follows:—

Affidavit of Service of a Default Summons.

I, A.B., of
[*or* G.H., a clerk [*or* servant] in the permanent and exclusive employ of]
[*or* L.M., of , the solicitor for]
[*or* R.S., of , solicitor, agent for L.M., of , solicitor for]
[*or* X.Y., a clerk in the employ of [R.S., of , solicitor, agent for] L.M., of , solicitor for]
the above-named plaintiff, make oath and say:—

That I [am a clerk [*or* servant] in the permanent and exclusive employ of]
[*or* am a clerk in the employ of [R.S., of , solicitor, agent for] L.M., of , solicitor for] the above-named plaintiff, and that I am over sixteen years of age.

That I did on the day of 18 , duly serve E.F. the above-named defendant [*or* one of the above-named defendants] with a summons, a true copy whereof is hereunto annexed, marked 'A,' by delivering the same personally to the said defendant [*here insert place where service was made*].

(*Endorse the copy-summons or other process thus:* This paper, marked 'A,' is the paper referred to in the annexed affidavit.)]

Stay of Proceedings.

16. Where several requests for arbitration are filed by different applicants against the same respondent in the same Court in respect of matters arising out of the same circumstances, the respondent may, on filing an undertaking to be bound, so far as his liability to pay compensation is concerned, by the award in such one of the said arbitrations as may be selected by the judge, apply to the judge under Order VIII., Rule 2, for an order to stay proceedings in the arbitrations other than the one so selected until an award is made in such selected arbitration; and Rules 2 to 6 of Order VIII. shall, with the necessary modifications, apply accordingly. Stay of proceedings in other arbitrations, to abide decision as to liability in selected arbitration. [*Conf.* Order VIII., Rules 2-6.]

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[The rules referred to are as follows :—

ORDER VIII.

1. Where several actions shall be brought by the same plaintiff against the same defendant in the same court for or in respect of different causes of action which might in accordance with the provisions of Order IV. have been joined in one action, the defendant shall be at liberty to apply to the judge that the said actions may be consolidated.

2. Where several actions shall be brought by different plaintiffs against the same defendant in the same court for or in respect of causes of action arising out of the same breach of contract, wrong or other circumstances, the defendant may, on filing an undertaking to be bound so far as his liability in the said several actions is concerned by the decision in such one of the said actions as may be selected by the judge, apply to the judge for an order to stay the proceedings in the actions other than in the one so selected, until judgment is given in such selected action.

3. Applications under the two preceding rules shall be made upon notice to the plaintiffs to be affected by any order made thereon.

4. Upon the hearing of any application for consolidation of actions or for stay of proceedings, the judge shall have power to impose such terms and conditions and make such order in the matter as may be just.

5. In case a judgment in a selected action under Rule 2 of the Order shall be given in favour of the defendant, the defendant shall be entitled to his costs up to the date of the order staying proceedings against every other plaintiff whose action is stayed, unless such plaintiff shall give the registrar within one month from such judgment written notice to set down his action for hearing, which, on the receipt of such notice, the registrar shall forthwith do and give notice thereof to the plaintiff and defendant.

6. In case a judgment in a selected action shall be given against the defendant, the plaintiffs in the actions stayed shall be at liberty to proceed for the purpose of ascertaining and recovering their debts or damages and costs.]

Answer by Respondents.

Answer by respondents. [*Conf.* Order X., Rules 9, 10.]

*17. (1.) If any respondent desires to disclaim any interest in the subject matter of the arbitration, or considers that the applicant's particulars are in any respect inaccurate or incomplete, or desires to bring any fact or document to the notice of the judge, or intends to rely on the fact that notice of the accident was not served in accordance with Section 2 of the Act, or that the claim for compensation was not made within the time limited by the said section, or intends to deny (wholly or partially) his liability to pay compensation under the Act, he shall, ten clear days at least before the day fixed for proceeding with the arbitration, file with the registrar an answer, stating his name and address, and the name and address of his solicitor (if any), and stating that he disclaims any interest in the subject matter of the arbitration, or stating in what respect the particulars are inaccurate or incomplete, or stating concisely any fact or document which he desires to bring to the notice of the judge, or on which he intends to rely, or the grounds on and extent to which he denies liability.

Form 8.

(2.) Such respondent shall, with such answer, file copies thereof for the applicant and the judge, and one copy for each of the other respondents, and the registrar shall within twenty-four hours after receiving such copies

* See Rule 3, Workmen's Compensation Rules, 1900, in Appendix I.

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transmit the same by post to the applicant and the judge and the other respondents respectively.

(3.) Subject to any answer so filed, and to the provisions of the next following paragraph, the applicant's particulars, and, in the case of a claim for compensation, the liability to pay compensation under the Act, shall be taken to be admitted.

(4.) Provided, that in case of non-compliance with this rule, and of the applicant's not consenting at the arbitration to permit a respondent to avail himself of any matter of which he should, pursuant to this rule, have given notice by filing an answer, the judge may, on such terms as he shall think fit, either proceed with the arbitration and allow the respondent to avail himself of such matter, or adjourn the arbitration to enable the respondent to file such answer.

[The respondent must state in his answer all the defences he intends to raise. The meaning of the last paragraph was considered by the Court of Appeal in *Silvester* v. *Cude* (15 T.L.R. 434). Smith L.J. thought that where a respondent failed to file an answer, the County Court Judge might take either of the courses mentioned in the rule, but that he was not bound to take either. In this particular case the respondent had failed to file an answer, but at the arbitration he proposed to give evidence that a building was not thirty feet in height, but the County Court Judge refused to allow him to give such evidence, and made an award.

Williams L.J. did not think it necessary to determine the meaning of the rule, but wished not to be taken as agreeing that where the rule applied the County Court Judge had jurisdiction to do anything except one or other of the two things mentioned in the rule.]

Submission to Award or Payment into Court by Respondents.

Submission to award or payment into court by respondents. Form 9.

* 18. (1.) Where a respondent from whom compensation is claimed admits liability, he may at any time before the day fixed for proceeding with the arbitration,

(a) Where the application is made by an injured workman, file with the registrar a notice that the respondent submits to an award for the payment of a weekly sum, to be specified in such notice; or

(b) Where the application is made on behalf of the dependants of a deceased workman, or for the settlement of the sum payable in respect of medical attendance on and the burial of a deceased workman who leaves no dependants, pay into court such sum of money as the respondent considers sufficient to cover his liability in the circumstances of the case.

[*Conf.* Order IX., Rule 11 (2).] Forms 10, 11.

(2.) The registrar shall, within twenty-four hours from the time of any notice filed or payment made pursuant to the last preceding paragraph, send notice thereof (with, where a notice is filed, a copy of such notice) to the applicant, and to the other respondents (if any).

Acceptance of weekly payment offered. Form 12. [*Conf.* Order IX., Rule 12a.]

(3.) If the applicant is a workman, and elects to accept in satisfaction of his claim the weekly payment specified in the respondent's notice, he shall send to the registrar and to the respondent by post, or leave at the registrar's office and at the residence or place of business of the respondent, a written notice stating such acceptance, within such reasonable time before the day fixed for proceeding with the arbitration as the time of filing of notice of submission by the respondent has permitted.

* See Rule 4, Workmen's Compensation Rules, 1900, in Appendix I.

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Acceptance of sum paid into court. Form 12. [*Conf.* Order IX., Rule 12*a*.]

(4.) If the application for arbitration is made on behalf of the dependants of a deceased workman, or for the settlement of the sum payable in respect of medical attendance and burial as aforesaid, and the applicant is willing to accept the sum paid into court in satisfaction of the compensation payable to the dependants, or in respect of such medical attendance and burial (as the case may be), he shall send to the registrar and to the respondent by post, or leave at the registrar's office and at the residence or place of business of the respondent, a written notice of such willingness, within such reasonable time before the day fixed for proceeding with the arbitration as the time of payment into court by the respondent has permitted.

If there are any other respondents, the applicant shall in like manner give notice of such willingness to such respondents; and if any of such respondents are willing to accept the sum paid into court in satisfaction of such compensation as aforesaid, they shall in like manner give notice of such willingness to the registrar and to the applicant and the other respondents.

Procedure if weekly payment offered or sum paid in is accepted.

(5.) If the applicant is a workman, and elects to accept in satisfaction of his claim the weekly payment submitted to by the respondent, or if in any other case the applicant and all the respondents give notice of their willingness to accept the sum paid into court, the following provisions shall apply:—

(*a*) Where the respondent submits to an award for the payment of a weekly sum, the judge may, on application made to him in or out of court, forthwith make an award directing payment of such weekly sum accordingly;

(*b*) Where the respondent has paid money into court, further proceedings against such respondent shall be stayed, except as hereinafter mentioned; and

(i) If the applicant and the other respondents agree as to the apportionment and application of such sum, the judge may, on application made to him in or out of court on behalf of or with the consent of all such parties, forthwith make an award for such apportionment and application;

(ii) In any other case the arbitration may proceed as between the applicant and the other respondents.

Costs payable by respondent. [*Conf.* Order IX., Rule 12*a* (3).]

(*c*) In any such case the judge may, in his discretion, by his award order the respondent filing notice of submission to an award or paying money into court to pay such costs as the applicant and the other respondents or any of them may have properly incurred before the receipt of notice of submission to an award or payment into court, including, if the judge on consideration of the facts of the case shall so order, any items which might have been allowed by order of the judge at the hearing of the arbitration.

Form 12. [*Conf.* Order IX., Rule 12*a* (4).]

(*d*) If the applicant or any respondent intends to apply for any such costs, he shall give notice of his intention in his notice of acceptance.

Procedure and costs if weekly sum offered or sum paid in is not accepted.

(6.) In default of notice of acceptance by the applicant and all the respondents, the arbitration may proceed; but if no greater weekly payment or compensation is awarded than that which the respondent has submitted to pay or has paid into court, such respondent shall not be liable to pay any further costs than such as he might have been ordered to pay if the weekly payment offered or sum paid into court had been accepted; and the judge may order any costs incurred by such respondent after notice of submission to an award or payment into court to be paid by any party who has not given notice of acceptance of such weekly payment or sum, and may order

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such costs to be set off against any costs payable to such party, or to be deducted from any weekly payment or compensation awarded to such party. The judge may also order any costs incurred after notice of payment into court by any party who has given notice of acceptance to be paid by any other party who has not given such notice, and to be deducted from any compensation awarded to such last-mentioned party.

Notice to parties against whom Indemnity claimed under Section 4 or Section 6, or otherwise.

Notice of claim to indemnity under Sec. 4, or Sec. 6, or otherwise. Form 13.

19. Where a respondent claims to be entitled under Section 4 or Section 6 of the Act or otherwise to indemnity over against any person not a party to the arbitration, he shall, five clear days before the day fixed for proceeding with the arbitration, file a notice of his claim, according to the form in the Appendix; and the registrar shall seal such notice and deliver it to the respondent, who shall serve the same, together with a copy of the applicant's request and particulars, and of the notice served on the respondent under Rules 14 and 15, upon the person against whom such claim is made; and the provisions of Rule 15 shall apply to such service.

If person served makes default in appearing, he is to be deemed to admit validity of award against respondent.

20. If any person served with a notice under the last preceding rule (hereinafter called the third party) desires to dispute the applicant's claim in the arbitration as against the respondent on whose behalf the notice has been given, he must appear before the judge on the day fixed for proceeding with the arbitration, or on any day to which he may have received notice from the registrar that the arbitration has been adjourned or postponed; and in default of his so doing he shall be deemed to admit the validity of any award made against such respondent, as to any matter which the judge has jurisdiction to decide in the arbitration as between the applicant and the respondent, whether such award is made by consent or otherwise.

Application to judge for directions as to conduct of arbitration.

21. (1.) The third party or the respondent may apply at or before the arbitration to the judge for directions; and the judge, upon the hearing of the application, may, if it shall appear desirable so to do, give the third party leave to resist the claim of the applicant against the respondent upon such terms as may be just, or to appear at the arbitration and take such part therein as may be just, and generally may give such directions as he shall think proper.

(2.) If the third party obtains leave to resist the claim of the applicant against the respondent, the judge shall have the same power to award costs as between the applicant and the third party as he has to award costs between the applicant and the respondent.

Judge how far empowered to decide questions as to liability of third party.

* **22.** (1.) Nothing in these Rules shall empower the judge to decide (otherwise than by consent) any question as to the liability of such third party to indemnify the respondent, or to make any award in favour of the respondent against such third party, or to make any further or other order than that the third party shall not be entitled in any future proceedings between the respondent and such third party to dispute the validity of the award as to any matter which the judge has jurisdiction to decide in the arbitration as between the applicant and the respondent.

(2.) Provided that, with the consent of the respondent and the third party,

* See Rule 5, Workmen's Compensation Rules, 1900, in Appendix I.

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[*Conf.* Order XI., Rule 2.]

(*a*) If the arbitration results in an award in favour of the applicant, or is finally decided otherwise than by an award, and the third party admits his liability to indemnify the respondent, the judge may, on application made to him at or after the hearing of the arbitration or the final decision thereof, make such award as the nature of the case may require in favour of the respondent against the third party; provided that execution thereon shall not be issued without leave of the judge or registrar until after satisfaction by the respondent of the award against him, or the amount recovered against him; or

[*Conf.* Order XI., Rule 3.]

(*b*) The judge may, on an application for directions, order any question as to the liability of the third party to make the indemnity claimed to be settled, as between the respondent and the third party, by arbitration after the arbitration between the applicant and the respondent, and may on such subsequent arbitration make such award as the nature of the case may require in favour of either party against the other.

[*Conf.* Order XI., Rule 4.]

(*c*) In any such case the judge may decide all questions of costs as between the respondent and the third party, and may order either of such parties to pay the costs of the other (including any costs payable by such party to any other party to the arbitration), or give such directions as to such costs as the justice of the case may require.

Claim to indemnity as between respondents. [*Conf.* Order XI., Rule 5.] *See* Act, Sec. 4.

23. (1.) Where a respondent claims to be entitled to indemnity against any other respondent, a like notice may be issued and the like procedure may be adopted for the determination of questions between the respondents as might be issued and adopted if such last-mentioned respondent were a third party.

(2.) Provided that where both the undertakers as defined by the Act and a contractor with them are made respondents to an arbitration, and it is decided in such arbitration that the contractor is liable to pay compensation under the Act, the judge may, without any consent or admission of liability on the part of such contractor, make an award in accordance with paragraph (2) (*a*) of the last preceding rule in favour of the undertakers against the contractor.

(3.) Nothing herein contained shall prejudice the rights of the applicant against any respondent.

[When both the undertakers and a contractor with them are made respondents, if the undertaker claims to be entitled to an indemnity against the contractor, he must under Rule 23 file a notice of his claim in the same manner as is prescribed by Rule 19 in the case of a claim for indemnity by a respondent against a third party (*Appleby* v. *Horseley Company, Ltd.* [1899] 2 Q.B. 521; 80 L.T.R. 853; 15 T.L.R. 410).

According to the decisions of the Court of Appeal in *Cass* v. *Butler* ([1900] 1 Q.B. 777; 82 L.T.R. 182; 16 T.L.R. 227) and *Cooper* v. *Davenport—Winstanley, Third Party* (16 T.L.R. 226)—a contractor with the undertaker does not himself become an undertaker, and consequently is not liable to pay compensation under the Act. On this subject, see note under Sec. 4 at p. 65.]

Procedure on Arbitration.

Procedure before judge.

***24.** Subject to the special provisions of these Rules, the procedure in an arbitration shall be the same as the procedure in an action commenced in the County Court by plaint and summons in the ordinary way, and deter-

* See Rule 6, Workmen's Compensation Rules, 1900, in Appendix I.

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mined by the judge without a jury; and the statutory provisions and rules for the time being in force relating to such actions shall, with the necessary modifications, apply to such arbitration accordingly; and in the application of such provisions and rules, the applicant's request for arbitration shall be deemed to be a summons with particulars annexed, the day fixed for proceeding with the arbitration shall be deemed to be the return day, and the applicant and respondents shall be deemed to be plaintiff and defendants respectively.

Appointment of Medical Referees under Schedule II., Paragraph 13.

Appointment of medical referees under Act, Sched. 2, par. 13.

25. (1.) Subject to and in accordance with regulations made by the Secretary of State and the Treasury under paragraph 13 of the second schedule to the Act, the judge may, at the hearing of an arbitration, appoint any legally qualified medical practitioner appointed by the Secretary of State for the purpose of the Act (in these Rules called a 'medical referee'), to report on any matter which seems material to any question arising in the arbitration.

[These regulations, dated May 2nd 1898, will be found in Appendix C.]

(2.) Regulations made under the said paragraph shall, so far as they affect the County Court or an arbitrator appointed by the judge of the County Court, and proceedings in the County Court or before any such arbitrator, be deemed to be Rules of Court, and shall have effect accordingly.

(3.) When any appointment is made as aforesaid, the judge may, subject to and in accordance with such regulations, order the injured workman to submit himself for examination by the medical referee; and it shall be the duty of the workman, on being served with such order, to submit himself for examination accordingly.

Award.

Award. Form 14.

26. (1.) The award of the judge on any arbitration shall be in writing, and shall be sealed, filed, and served on all persons affected thereby, and shall be enforceable in the same manner as a judgment or order of the Court.

52 and 53 Vict. c. 49. Sec. 7 (c).

(2.) The judge shall have power at any time to correct any clerical mistake or error in such award arising from any accidental slip or omission.

[By Sec. 5 of the Debtors Act, 1869,[1] any Court has power to commit to prison, for a period not exceeding six weeks, any judgment debtor who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that, or any other competent Court. A judgment creditor who desires to have this jurisdiction exercised against his debtor, must proceed by judgment summons. An applicant, in whose favour an award has been made, or an agreement to pay compensation filed, will be in the position of a judgment creditor, and if the instalments are not paid, he can proceed against the respondent by way of judgment summons. See this subject discussed in the note under Schedule II. (8) at p. 226.]

Proceedings before Arbitrator appointed by Judge.

Appointment of Arbitrator by Judge.

Appointment of arbitrator by judge.

27. With respect to the appointment of an arbitrator by the judge, the following provisions shall apply :—

[1] 32 and 33 Vict. c. 62.

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(a) If with respect to any Court the Lord Chancellor, by general order, authorises the settlement by an arbitrator appointed by the judge of matters which, in default of such authorisation, would be settled by the judge, the judge may from time to time, on an application being made for the settlement of any matter, either settle the same himself, or he may, with the approval of the Lord Chancellor, appoint, by writing under his hand, and filed in the Court, an arbitrator to settle such matter.

(b) If with respect to any Court the Lord Chancellor makes no such general order as aforesaid, then, on an application being made for the settlement of any matter, the judge may (if from the state of business in the Court, or for any other reason, he is unable to settle such matter within a reasonable time) apply to the Lord Chancellor to authorise the settlement of such matter by an arbitrator appointed by the judge.

(c) If the Lord Chancellor does not grant such authority, the judge shall proceed to settle the matter in accordance with the Act and these Rules.

(d) If the Lord Chancellor grants such authority, the judge may, with the approval of the Lord Chancellor, appoint, by writing under his hand and filed in the Court, an arbitrator to settle such matter.

Act, Sched. 2, par. 7.

(e) Where pursuant to paragraph 7 of the second schedule to the Act a judge of the High Court appoints a new arbitrator in the place of an arbitrator appointed by the judge, the party obtaining such appointment shall lodge with the registrar the order appointing such arbitrator, or a duplicate or copy thereof under the seal of the High Court; and thereupon the registrar shall act and the arbitration shall proceed in the same manner as if such arbitrator had been appointed by the judge.

Fixing day for Arbitration.

Fixing day and place for proceedings before arbitrator.

28. Where any matter is to be settled by an arbitrator, the judge shall return the copy of the request for arbitration to the registrar, with the appointment of such arbitrator, to be transmitted to the arbitrator: and the registrar shall transmit the copy of the request and a copy of the appointment to the arbitrator, who shall, as soon as conveniently may be, appoint a day and hour for proceeding with the arbitration, in accordance with Rule 13, and the provisions of that rule as to the place where an arbitration shall be held shall apply. Provided, that where the arbitration is to be held at the place where the Court is held, the day appointed for the arbitration shall, if possible, be one on which the Court or other suitable accommodation in the Court House will be available for the arbitration.

Procedure before Arbitrator.

Procedure before arbitrator.

29. (1.) On the day for proceeding with an arbitration being fixed, the registrar shall proceed according to Rule 14, and thenceforward the arbitration shall proceed in the same manner as an arbitration before the judge; and these Rules shall apply and the officers of the Court shall act accordingly, with the substitution of the arbitrator for the judge.

(2.) Provided that—

(a) In any case coming within the provisions of paragraph 5 (a) or paragraph 5 (b) (i) of Rule 18, or in any other case in which, after an arbitrator has been appointed, but before the day fixed for proceeding with the arbitration, the parties agree upon an award, the judge may, on application

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made to him in or out of Court on behalf of or with the consent of all parties, settle the matter himself; and thereupon the functions of the arbitrator as to such matter shall cease, and the registrar shall forthwith inform him that the matter has been settled; and

(b) Any application for the enforcement of or for staying proceedings on an award, which would in the case of an award made by the judge be required to be made to the judge, shall, in the case of an award made by an arbitrator, be in like manner made to the judge.

Submission of Question of Law by Arbitrator to Judge.

Submission of question of law by arbitrator to judge. Act, Sched. 2, par. 4.

30. (1.) Where an arbitrator (whether agreed on by the parties or appointed by the judge) submits any question of law for the decision of the judge under paragraph 4 of the second schedule to the Act, such submission shall be in the form of a special case.

Statement of case.

(2.) Such case shall be intituled in the matter of the Act and of the arbitration, and shall be divided into paragraphs numbered consecutively, and shall state concisely such facts and documents as may be necessary to enable the judge to decide the questions of law raised thereby. Upon the argument of such case the judge and the parties shall be at liberty to refer to the whole contents of such documents, and the judge shall be at liberty to draw from the facts and documents stated in the case any inference, whether of fact or of law, which might have been drawn therefrom if proved at the hearing of an arbitration.

Fixing day for hearing. [Order XL., Rule 5.] Form 15.

(3.) Such case shall be signed by the arbitrator and sent to the registrar, who shall transmit the same to the judge, and the judge shall as soon as conveniently may be appoint a day and hour for hearing the case, and instruct the registrar to give notice thereof forthwith to the parties. Such day shall be so fixed as to allow such notice to be given ten days at least before the day fixed for the hearing, unless the judge shall, with the consent of all parties, fix an earlier day.

Copies of case.

(4.) The registrar shall, on the application and at the cost of any party, furnish him with a copy of the case.

Power of judge on hearing of case.

(5.) On the hearing of the case the judge may, after deciding the question submitted to him, remit the case with a memorandum of such decision to the arbitrator, for him to proceed thereon in accordance with such decision: or if the decision of the judge on the question submitted to him disposes of the whole matter, he may himself make an award in the arbitration in accordance with such decision.

(6.) The judge may remit the case to the arbitrator for re-statement or further statement.

Costs of special case.

(7.) The judge shall have the same power over the costs of a special case as he has over the costs of an arbitration, or he may direct that such costs shall be dealt with as costs attending the arbitration; and the provisions of the Act and these Rules as to such costs shall apply accordingly.

Subsequent Arbitration in Matter already settled by Arbitrator.

Subsequent arbitration in matter settled by arbitrator.

31. Where an award has been made in any matter by an arbitrator appointed by the judge, any subsequent proceedings by way of arbitration in relation to any matter settled by such award shall be taken before the same arbitrator, if his services are available for the purpose of such proceedings, unless the judge shall otherwise direct.

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Appearance of Parties in Arbitration.

Appearance of parties.

[*Conf.* County Courts Act, 1888, Sec. 72.]

32. (1.) A party to any arbitration under the Act may appear—

(*a*) In person:

(*b*) By any solicitor who would be entitled to appear for such party in an action in the County Court:

(*c*) By counsel:

Or, by leave of the judge or arbitrator, a party may appear—

(*d*) By a member of his family:

(*e*) By a person in the permanent and exclusive employment of such party:

(*f*) In the case of a company or corporation, by any director of the company or corporation, or by the secretary or any other officer or any person in the permanent and exclusive employment of the company or corporation;

(*g*) By any officer or member of any society or other body of persons of which such party is a member or with which he is connected; or

(*h*) Under special circumstances, by any other person.

[*Conf.* County Courts Act, 1888, Sec. 72.]

(2.) No person other than a solicitor who appears or acts on behalf of any party in any arbitration under the Act shall be entitled to have or recover any fee or reward for so appearing or acting, other than such travelling expenses and (in the case of a workman or a member of his family) allowance for time (if any) as shall be allowed by the judge or arbitrator: provided that nothing in these rules contained shall affect the right of counsel to appear or act in any arbitration, or the right of any solicitor to recover costs in respect of his employment of counsel to appear or act as aforesaid.

Costs.

Costs.

* 33. (1.) Any costs of and incident to an arbitration and the proceedings connected therewith directed by the judge or by an arbitrator (whether agreed on by the parties or appointed by the judge) to be paid by one party to another shall, in default of agreement between the parties as to the amount of such costs, be taxed according to such one of the scales of costs applicable to actions in the County Court as the judge or arbitrator shall direct; and in default of such direction shall be taxed according to the scale which would be applicable if the proceeding had been an action in the County Court: and the statutory provisions and rules for the time being in force as to the allowance and taxation of costs in such actions shall apply accordingly.

(2.) Where the subject matter of the arbitration is not a capital sum, the judge or arbitrator shall determine what, for the purpose of the allowance and taxation of costs, shall be considered to be the amount of the subject matter of the arbitration.

(3.) The judge or arbitrator, in dealing with the question of costs, may take into consideration any offer of compensation proved to have been made on behalf of the employer.

[See *Welland* v. *Great Western Railway Co.* (16 T.L.R. 297).]

(4.) Where any workman submits himself for examination to a medica referee under paragraph 11 of the first schedule to the Act, and the certificate of the referee is used in any subsequent arbitration, any reasonable travelling and other expenses incurred by the workman in obtaining such certificate

* See Rule 7, Workmen's Compensation Rules, 1900, in Appendix I.

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(if not otherwise provided for) may, by order of the judge or arbitrator, be allowed as costs in the arbitration.

(5.) Where a workman is ordered to submit himself for examination by a medical referee appointed to report under paragraph 13 of the second schedule to the Act, any reasonable expenses incurred by such workman in travelling to attend on such referee for examination may, by order of the judge or arbitrator, be allowed as costs in the arbitration.

34. Where any costs are awarded by an arbitrator agreed on by the parties, it shall be the duty of the registrar of the court in which a memorandum of the decision of the arbitrator is recorded pursuant to paragraph 8 of the second schedule to the Act, on application made to him, to tax such costs, and to enter in the register the amount of such costs allowed on taxation; and such entry shall be deemed to be part of such memorandum, and shall be enforceable accordingly.

Taxation of costs awarded by arbitrator agreed on by parties.

34a. Where any party to whom costs are awarded acts by a solicitor, such solicitor shall have the same authority to take out of court or receive any sum paid into court or payable in respect of such costs by the party against whom such costs are awarded as he would have if such costs were awarded in an action.

As to authority of solicitor to receive costs payable by adverse party.

Duty of Judge as to taking Notes.

35. At the hearing of any arbitration or special case the judge, at the request of any party, shall make a note of any question of law raised, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision in the arbitration or on the hearing of the case: and he shall, at the expense of any party to such arbitration or case, furnish a copy of the note so taken to or allow a copy of the same to be taken by or on behalf of such party, and shall sign such copy, whether a notice of motion by way of appeal has been served or not.

Note to be taken, on request, of question of law raised, etc., and copy furnished. [*Conf.* County Courts Act, 1888, ss. 120, 121.]

Appeals.

36. Appeals under paragraph 4 of the second schedule to the Act shall be had in accordance with the provisions of the Rules of the Supreme Court relating thereto.

Appeals. Act, Sched. 2, par. 4. [Order XXXII., Rule 1.]

[The Rules are set out in Appendix D.]

37. (1.) When the Court of Appeal has given judgment on any appeal, any party may deposit the order of the Court of Appeal, or an office copy thereof, with the registrar: and the registrar shall file such order or copy, and shall transmit a copy thereof to the judge: and such order shall have the same effect as if it had been a decision of the judge.

Deposit of order of Court of Appeal with registrar, and procedure thereon. [Order XXXII., Rules 2, 4.]

(2.) If such order has the effect of an award or decision in the matter in favour of any party, such order shall be served and recorded, and may be proceeded on, in the same manner as if it had been an award or decision of the judge.

(3.) If such order be to the effect that an award be made or a decision given in favour of any party, the judge shall make such award or give such decision accordingly.

(4.) If such order directs or involves a re-hearing or further hearing of the

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arbitration or special case, the judge shall as soon as conveniently may be appoint a day and hour for such re-hearing or further hearing, and shall instruct the registrar to give notice thereof forthwith to the parties.

(5.) Generally the judge shall make such award or give such decision, and give such directions and take or direct to be taken such proceedings in the matter, as may be necessary to give effect to the order of the Court of Appeal.

Memorandum under Schedule II., Paragraph 8.

Memorandum to be sent to registrar. Act, Sched. 2, par. 8. Form 16.

38. (1.) The memorandum as to any matter decided by a committee or by an arbitrator or by agreement, which is by paragraph 8 of the second schedule to the Act required to be sent to the registrar, shall be intituled in the matter of the Act, and shall be left at the office of the registrar, or sent by post by registered letter addressed to the registrar at his office, as soon as may be after the matter has been decided.

(2.) Where the matter is decided after a medical referee has been appointed to report on any matter under paragraph 13 of the said second schedule, a copy of the report of such referee shall be annexed to the memorandum and recorded therewith; and if such referee attended any proceeding in the arbitration, it shall be so stated in the memorandum.

Authentication and record of memorandum of decision of committee or arbitrator.

39. If the memorandum purports to be a memorandum of a decision of a committee or an arbitrator, and to be signed by the chairman and secretary of the committee, or by the arbitrator, the registrar shall record the memorandum without further proof of its genuineness; and it shall be the duty of the committee or arbitrator, as soon as may be after the decision, to draw up such memorandum and to sign the same or cause it to be signed as aforesaid, and to leave or send the same as aforesaid, or to deliver the same to some party interested, to be by him so left or sent.

Authentication and record of memorandum of decision arrived at by agreement.

40. If the memorandum purports to be a memorandum of a decision arrived at by agreement, then if such memorandum purports to be signed by or on behalf of all parties to such decision, the registrar shall record it without further proof.

Inquiry as to genuineness if such memorandum signed by one party only. Form 17.

41. If the memorandum purports to be signed by or on behalf of one or some only of the parties, the registrar may record the same; or he may, before recording the same, send a copy thereof to the other parties affected, and request them to inform him whether the memorandum is genuine.

Proceedings thereon.

42. If all the parties admit the genuineness of the memorandum, or do not dispute it within a reasonable time, the registrar shall record it without further proof.

Notice if genuineness disputed. Forms 18, 19.

43. If any party disputes the genuineness of the memorandum, the registrar shall inform the party by whom it was left with or sent to him of such dispute, and that the memorandum will not be recorded except with the consent in writing of the party disputing the same, or by order of the judge.

Application to judge to order memorandum to be recorded.

44. If the consent mentioned in the last preceding rule cannot be obtained, the party by whom the memorandum was left or sent may apply to the judge to order the same to be recorded.

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Proceedings for Record of Memorandum or Rectification of Register.

45. The following provisions shall apply to an application for an order that a memorandum be recorded, or an application to the judge to rectify the register pursuant to paragraph 8 of the second schedule to the Act.

Proceedings on application for record of memorandum or rectification of register. Form 20. *See* Order XII., Rule 11a.

(*a*) The application shall be made in court on notice in writing, stating the relief or order which the applicant claims.

(*b*) Such notice shall be filed with the registrar, and copies thereof shall be served—

(i) In the case of an application for an order that a memorandum be recorded, on the party disputing such memorandum;

(ii) In the case of an application to rectify the register, on every party who would be affected by such rectification, subject to the provisions of these Rules as to the parties to an arbitration;

or on the solicitor of such party, ten clear days at least before the hearing of the application, unless the judge or registrar shall give leave for shorter notice.

(*c*) On the hearing of the application, witnesses may be orally examined in the same manner as on the hearing of an action.

(*d*) On the hearing of the application the judge may make such order or give such directions as may be just.

(*e*) The provisions of the Act and these Rules as to the costs of an arbitration before the judge shall apply to any such application.

Costs of Solicitor or Agent under Schedule II., Paragraph 12.

46. The following provisions shall apply to an application under paragraph 12 of the second schedule to the Act for the determination of the amount of costs to be paid to a solicitor or agent:—

Application to determine costs payable to solicitor or agent. Act, Sched. 2, par. 12. Form 21.

(*a*) Such application may be made to the judge or arbitrator at or immediately after the hearing of the arbitration.

(*b*) If not so made, such application may be made at a subsequent date, but in that case it shall, if the arbitration was before the judge or before an arbitrator appointed by him, be in every case made to the judge.

Amendment of Rule 46 as to applications to determine costs payable to solicitor or agent.

(*c*) The application, if made to the judge under the last preceding paragraph, shall be made in court on notice in writing in accordance with Rule 45.

(*d*) Such notice shall be served on the person for whom the solicitor or agent acted in accordance with the said rule, and the provisions of the said rule shall apply to the proceedings on such application.

(*e*) On the hearing of any application under this rule, the judge or arbitrator may award costs to the solicitor or agent, and may make an order declaring such solicitor or agent to be entitled to recover such costs from the person for whom he acted, or to be entitled to a lien for such costs on any sum awarded as compensation to such person, or to be entitled to deduct such costs from any such sum, or may make such order or give such directions as may be just.

(*f*) Any costs awarded to a solicitor or agent on any such application shall, in default of agreement between the parties as to the amount of such costs, be taxed according to such one of the scales of costs applicable to actions in the County Court as the judge or arbitrator shall direct; and in default of such direction such costs shall be taxed according to

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the scale which would be applicable if the proceeding had been an action in the County Court; and the statutory provisions and rules for the time being in force as to the allowance and taxation of costs in such actions shall apply accordingly.

(g) Where the subject matter of the arbitration is not a capital sum, the judge or arbitrator shall determine what, for the purpose of the allowance and taxation of such costs, shall be considered to be the amount of the subject matter of the arbitration.

Amendment of Rule 47 as to order declaring lien, etc.

47. Where an order is made by the judge or an arbitrator awarding costs to a solicitor or agent, and declaring such solicitor or agent to be entitled to recover such costs from the person for whom he acted, or to be entitled to a lien for such costs on any sum awarded as compensation to such person, or to be entitled to deduct such costs from any such sum, the following provisions shall apply:

(a) The registrar shall, on application made to him, tax such costs.

(b) A copy of the order, and, when the amount to which such solicitor or agent is entitled has been ascertained by taxation, a memorandum of such amount, shall, at the request and cost of the solicitor or agent, be issued by the registrar for service on the party liable to pay the sum awarded as compensation; and service thereof may be effected on such party in accordance with Rule 15.

(c) A memorandum of such order, and when such amount has been ascertained a memorandum of such amount, shall be recorded in the register in which the memorandum or award under which the sum awarded as compensation is payable is recorded, and such last mentioned memorandum or award shall have effect subject to such order and memorandum.

(d) The party liable to pay such compensation shall on demand pay to the solicitor or agent the amount to which he is entitled, but so that such party shall not be liable to pay any amount in excess of that which he is liable to pay for compensation, or to pay such amount by any other instalments than those by which he is liable to pay such compensation.

(e) If the party liable to pay such compensation fails on demand to pay any amount which he is liable to pay to such solicitor or agent, the judge may, on application made to him on notice to such party in accordance with Rule 45, and on proof of the order having been served on and demand for payment made to such party, order such party to pay such sum; and in default of payment the judge may order execution to issue to levy such amount.

(f) Payment made by or execution levied on the party liable to pay such compensation shall be a valid discharge to him, as against the party entitled to such compensation, to the amount paid or levied.

(g) Where the sum awarded as compensation has been paid into Court, the amount to which the solicitor or agent is entitled shall be paid to him out of such sum.

Certificate under Section 1, Sub-section 4.

Certificate under Act, Sec. 1, Sub-sec. 4. Form 22.

48. (1.) Where an action is brought in the County Court to recover damages independently of the Act, for injury caused by any accident, and the Court proceeds under sub-section 4 of Section 1 of the Act, the certificate given by the court shall be according to the form in the Appendix.

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(2.) The registrar shall, on receiving a certificate given by any other court under the said sub-section, record the same in like manner as if such certificate were a memorandum as to a matter decided by an arbitrator sent to the registrar pursuant to paragraph 8 of the second schedule to the Act.

Execution.

Execution. Form 23. [*Conf.* Order XXV., Rule 7.]

*49. (1.) When a party liable to pay compensation or costs under any award, memorandum or certificate, has made default in payment of the amount awarded, or where payment is to be made by instalments, of any instalment, execution may issue against his goods, without leave for the amount in payment of which he has made default.

(2.) Where such sum is not payable into court, the party applying for execution shall satisfy the registrar, by affidavit or otherwise, as to the amount in payment of which default has been made. [See note under Schedule II. (8) at p. 226.]

Suspension of Proceedings or Weekly Payments on Refusal to Submit to Examination under Paragraph 8 or Paragraph 11 of Schedule I.

Application to stay proceedings before or after award on refusal of workman to submit to examination under Act. Sched. 1, par. 8, or par. 11. Form 24.

50. (1.) In any case in which an arbitration is pending, or an award has been made or a memorandum recorded or a certificate given, and the employer or any person by whom the employer is entitled to be indemnified alleges that the workman who claims or has been awarded compensation refuses to submit himself for examination in accordance with paragraph 8 or paragraph 11 of the first schedule to the Act, or obstructs such examination, such employer or other person may apply to the judge or arbitrator to stay proceedings in the arbitration or to suspend the weekly payments awarded until such examination has taken place.

(2.) Such application shall be made in or out of court in accordance with Rule 45, and the provisions of the said rule shall apply to the proceedings on such application, with the following modifications :—

(*a*) The notice shall be served five clear days at least before the hearing of the application, unless the judge or registrar shall give leave for shorter notice; and

(*b*) Where the application is made after award, it shall in every case be made to the judge.

Applications against Insurers under Section 5.

Application against insurers under Sec. 5. [*Conf.* Order XXVIA., Rule 1.] Form 25.

51. Where a workman claims to be entitled under Section 5 of the Act to a charge on any sum to which any employer is entitled from insurers, such workman may, upon lodging with the registrar of the court in which the memorandum or award or certificate under which the employer is liable to pay compensation is recorded an affidavit made by the applicant or his solicitor, setting forth the circumstances in which the applicant claims to be entitled to such charge, enter a plaint to obtain payment of such sum, or so much thereof as may be sufficient to satisfy the compensation which the employer is liable to pay to the workman.

Summons thereon. Form 26. [*Conf.* Order XXVIA., Rule 1.]

52. Thereupon a summons calling upon the insurers to show cause why they should not pay into court the sum to which the employer is entitled from them, or so much thereof as may be sufficient to satisfy the compensation which the employer is liable to pay to the workman, shall be issued by the registrar for service on the insurers.

* See Rules 8 and 9, Workmen's Compensation Rules, 1900, in Appendix I

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Service of summons, and procedure thereon. [*Conf.* Order XXVIA.] Forms 28, 29.

53. Such summons shall be served in accordance with the provisions of Rule 15, and when so served shall bind in the hands of the insurers all sums due, owing, or accruing from them to the employer in respect of the compensation which he is liable to pay to the workman under the memorandum or award or certificate; and, subject to these rules, the procedure on such summons shall be the same as if the applicant had obtained a judgment or order for the payment of money against the employer, and the sum to which the employer is entitled from the insurers were a debt due, owing, or accruing from the insurers to the employer, and the applicant had issued a garnishee summons against the insurers: and the provisions of Rules 5 to 9 and 11 to 13 of Order XXVIA. shall, with the necessary modifications, apply to such summons and the procedure thereon.

[The Rules referred to are as follows:—

ORDER XXVIA.

5. Where the garnishee shall pay into court five clear days before the return-day the amount due from him to the debtor liable under the judgment or order, or an amount equal to the judgment or order, he shall not be liable for any costs incurred by the person who obtained the judgment or order.

6. The registrar shall forthwith give notice of the payment into court to the person who has obtained the judgment or order, and if such person elects to accept the money so paid into court by the garnishee, and shall send to the registrar and to the garnishee by prepaid post or leave with the registrar a written notice stating such acceptance, within forty-eight hours after receipt of the notice of payment into court, all further proceedings against the garnishee shall abate, and the registrar shall pay the money so paid into court to the person who obtained the judgment or order in discharge or part discharge of the debt due to such person, and of the costs of issuing the garnishee summons.

7. If the garnishee does not before the return-day of the summons pay into court the amount due from him to the debtor liable under the judgment or order, or an amount equal to the judgment or order, and does not on the return-day dispute the debt due or claimed to be due from him to such debtor, or if he does not appear on the return-day either in person or by some person duly authorised on his behalf, then the judge may give judgment for the plaintiff, and may order execution to issue to levy the amount due from the garnishee, or so much thereof as may be sufficient to satisfy the judgment or order.

8. Upon the return-day, should the amount paid into court under Rule 5 of this Order be not accepted, the judge shall determine as to the liability of the garnishee to pay any further sum on account of the debt claimed to be due from him to the debtor, and as to the party by whom the costs of the proceeding by plaint shall be paid, and make such order as may be in accordance with such determination.

9. If the garnishee appears on the return-day and disputes his liability the judge may instead of giving judgment order that any issue or question necessary for determining his liability be tried or determined in any manner in which any issue or question in an action may be tried or determined.

11. Whenever in proceedings to obtain an attachment of debts it is suggested by the garnishee that the debt sought to be attached belongs to some third

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person, or that any third person has a lien or charge upon it, the judge may order such third person to appear, and state the nature and particulars of his claim upon such debt. After hearing the allegations of such third person and of any other person whom *the judge*, by the same or any subsequent order, *may* order to appear, or in case of such third person not appearing when ordered, the judge may decide in favour of the person who obtained the judgment or order, or may order any issue or question to be tried or determined between the third person and the person who obtained the judgment or order, and may bar the claim of such third person or make such other order as such judge shall think fit, upon such terms, in all cases, with respect to the lien or charge (if any) of such third person, and to costs, as the judge shall think just and reasonable.

12. Payment made by or execution levied upon the garnishee under any such proceeding as aforesaid shall be a valid discharge to him as against the debtor, liable under a judgment or order, to the amount paid or levied, although such proceeding may be set aside, or the judgment or order reversed.

13. The costs of any application for an attachment of debts, and of any proceedings arising from or incidental to such application, shall be in the discretion of the judge.]

Provisions for notice to employer, or assignee, etc. Form 27.

54. It shall not be necessary in the first instance to give notice of the issue of the summons to the employer or his assignee (or, in case of bankruptcy, to the official receiver or other trustee, or, in case of liquidation of a company, to the provisional or other liquidator), but the judge or registrar may at any time direct such notice to be given; and thereupon the registrar shall issue for service on the person to whom such notice is directed to be given a copy of the summons, together with a notice signed by the registrar himself and under the seal of the court, giving notice to such person as to the day on which he is to attend at the court, and that if he does not attend, either in person or by his solicitor, at the place and time mentioned in the notice, such order will be made and proceedings taken as the judge may think fit; and such summons and notice shall be served in accordance with the provisions of Rule 15.

Provisions as to weekly payments payable by insurers

55. Where the amount which the employer is liable to pay to a workman as compensation is a weekly payment, and such employer is entitled to a weekly payment of the same or any less amount from insurers in respect of such amount, the judge may order the insurers to pay such weekly payment direct to the workman. In any such case the insurers shall have the same rights as the employer with respect to the review or redemption of such weekly payment.

[See notes under Schedule I. (12) and Schedule I. (13). This rule appears to be contrary to those clauses. Under Schedule I. (12) application for a review can only be made by the employer or the workman, and under Schedule I. (13) the employer is the only person who can apply for redemption. Hence this rule would appear to be *ultra vires*.]

Application against two or more sets of insurers.

56. Where an employer is entitled to separate sums from separate insurers in respect of the amount due to a workman, all or any two or more of such insurers may be made parties to one application.

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Apportionment of sum payable by insurers, where more persons than one are entitled to compensation.

57. (1.) Where it appears on any application under Section 5 of the Act that the employer is liable to pay compensation in respect of more accidents than one, or to more workmen than one, either under one award or memorandum or certificate or under two or more separate awards or memorandums or certificates, and that such employer is entitled to any sum from insurers in respect of the amounts due under such liability, but such sum is not sufficient to satisfy the whole of the amounts due under such liability, and has not, as between the employer and the insurers, been apportioned between such amounts or appropriated exclusively to some only of such amounts, the judge may order the insurers to pay such sum into court, and may, after notice given to the persons entitled to compensation in such manner as the judge shall direct, apportion such sum between the several persons entitled to compensation in such manner as may be just. For the purpose of any such apportionment, the judge may order any weekly payment to be redeemed, and may appoint any one or more proper person or persons to represent any other persons having the same interest, and may direct any necessary inquiries or accounts to be made or taken, and generally may give such directions and make such orders, as to costs or otherwise, as may be just.

Transfer and consolidation of proceedings for this purpose.

(2.) Where the employer is liable to pay compensation as aforesaid under two or more separate awards or memorandums or certificates recorded in the same court, the judge may for the purposes of this rule order the proceedings under such awards or memorandums or certificates to be consolidated; and where the employer is liable under separate awards or memorandums or certificates recorded in different courts, the judge of the court in which the summons to the insurers is issued may either request the judge of the other court to transfer the proceedings in such other court to the first-mentioned court, or may himself transfer the proceedings in the first-mentioned court to such other court; and such orders for transfer and consolidation of proceedings may be made as may be just and expedient for the purpose of dealing with the matter in the manner most convenient to the several persons entitled to compensation.

Discovery in aid of application under Sec. 5. Order XXV. Rule 52.

58. In any case in which the circumstances are such that an application may be made under Section 5 of the Act, the provisions of Order XXV. Rule 52, as to discovery in aid of execution, shall apply in the same manner as if the employer were a debtor liable under a judgment or order; and such provisions may be resorted to either before or after an application is made.

[The Rule referred to is the following:—

ORDER XXV.

52. When a judgment or order is for the recovery or payment of money, the party entitled to enforce it may apply to the judge or registrar for an order that the debtor liable under such judgment or order, or in the case of a corporation, that any officer thereof, be orally examined as to whether any and what debts are owing to the debtor, and whether the debtor has any and what other property or means of satisfying the judgment or order before the judge or registrar, as the judge or registrar shall appoint; and the judge or registrar may make an order for the attendance and examination of such debtor, or of any other person, and for the production of any books or documents.]

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Payment and Application of Money directed to be Invested.

59. Where pursuant to paragraphs 6 and 7 or paragraph 13 of the first schedule to the Act, or pursuant to Section 5 of the Act, any sum is agreed or is ordered by a committee or an arbitrator, or by the judge, to be invested in the Post Office Savings Bank by the registrar in his name as registrar, or to be paid into the Post Office Savings Bank in the name of the registrar, the following provisions shall apply:— Payment into court and application of money directed to be invested. Act, Sec. 5, and Sched. 1, pars. 6, 7, 13.

(a) The registrar of the court in which the memorandum of the agreement or of the order of the committee or arbitrator under which such sum is to be invested is recorded, or, in the case of an award made by the judge or an arbitrator appointed by him, or of an order made by the judge under Section 5 of the Act, the registrar of the court in which the award or order was made, shall, on the memorandum or award or order being recorded, receive the sum to be invested from the party by whom the same is payable.

(b) Immediately on such sum being paid, or on payment thereof being enforced, the registrar shall invest the same in accordance with the agreement, award, or order, and shall record such payment and investment in the special register hereinafter mentioned.

(c) Any sum so paid and invested shall be paid out of court or otherwise disposed of in accordance with the agreement, award, or order under which the same is paid and invested, and, subject to the terms of such agreement, award, or order, in such manner as the judge from time to time shall direct, on application made to him in accordance with Rules 21 and 22 of Order IX. Order IX. Rules 21, 22.

[The Rules referred to are as follows:—

ORDER IX.

21. In any action or matter in which a sum of money has been awarded to or recovered by an infant, or person of unsound mind not so found by inquisition, the judge may at or after the trial order that the whole or any part of such sum shall be paid into court to the credit of an account intituled in the action or matter; and any sum so paid into court may either be invested, or be paid from time to time out of court to such person as the judge may direct, to be held and applied for the benefit of such infant or person of unsound mind in such manner as the judge from time to time shall direct.

22. When any moneys have been paid into court or invested pursuant to the order of the judge under the last preceding rule, it shall not be necessary that applications in regard to them shall be made by petition. Any person interested may apply in person to the judge, or registrar, and he, on such evidence of right and identity as he may think necessary, may make such order as he may deem to be just.]

Proceedings in one Court as to subject-matter of Award or Memorandum recorded in another Court.

60. Where an award, or a memorandum under paragraph 8 of the second schedule to the Act, or a certificate under sub-section 4 of Section 1 of the Filing of certified copy of

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memorandum, etc, recorded in one court under Act, Sched. 2, par. 8, before taking subsequent proceedings in another court under par. 9.

Act, has been recorded in any court, and any party desires to take any subsequent proceedings with reference to the subject-matter of such award, memorandum, or certificate in any other court under paragraph 9 of the said schedule, he shall before taking such proceedings obtain from the registrar of the first-mentioned court a certified copy of such award, memorandum, or certificate, and shall file the same in the court in which he desires to take proceedings, and the registrar of such last-mentioned court shall record the same as if it had been an award made in or a memorandum or certificate sent to the court.

Transfer of Proceedings.

Transfer. *Conf.* County Courts Act, 1888, s. 85

61. If the judge shall be satisfied by any party to any matter under the Act pending in his court that such matter can be more conveniently proceeded with in any other court, he may order such matter to be transferred to such other court; and thereupon the registrar shall forthwith transmit by registered post to the registrar of the court to which such matter is transferred all original documents filed in such matter, and a certified copy of all records made with reference to such matter, and shall transfer to such last-mentioned court any money invested in his name as registrar; and thenceforth such matter shall be proceeded with in the court to which it is transferred in the same manner as if it had originally been commenced therein. The provisions of Order VIII., Rule 9, shall apply to any such transfer or application for a transfer.

Order VIII., Rule 9.

[The Rule referred to is as follows:—

ORDER VIII.

9. Where application is intended to be made for the transfer of any action, matter, or proceeding under Section 85 of the Act, or under the last preceding rule, or under Order XXXIII., Rule 12, three clear days' notice in writing of such intended application shall be given by the applicant to the registrar of the court in which such action, matter, or proceeding is pending, and to all parties who may be affected by such application; but the judge may, at any time, by consent of all parties, or without such consent if he shall think fit, order a transfer although this rule has not been complied with. When a transfer is ordered the judge may make such order as to costs incurred before or occasioned by such transfer as he shall think fit.]

Filing and Service of Documents and Notices.

62. (1.) Where any document is to be filed with the registrar under these Rules, that document may be so filed by delivering it at the office of the registrar, or by sending it by post addressed to the registrar at his office.

(2.) Where any document is to be so filed, there shall be filed with the original document as many copies of the document as there are persons to whom copies of the document or any part thereof are to be sent by the registrar, and in addition a copy for the use of the judge or arbitrator.

(3.) Where any document is under these Rules to be sent to any person by the registrar, that document may be sent by post

(4.) Any proceeding, document, or notice which s under these Rules to be served on any party may be served on such party by the opposite party or his solicitor; and where no special provision as to the mode of service is

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made by these Rules, any such proceeding, document, or notice may be served on such party, or where he acts by a solicitor, on his solicitor, in manner provided by sub-sections 2 to 5 of Section 2 of the Act with reference to service of notice in respect of an injury.

Act, Sec. 2 sub-secs. 2 to 5.

Procedure Generally.

63. The provisions of Order XXIII., Rule 4, and Order LI., Rules 1 to 6, as to parties acting by solicitors, and as to substituted service and notice of lieu of service, shall apply to proceedings under the Act.

Provisions as to parties acting by solicitors, and as to substituted service and notice in lieu of service. [Order XXIII., Rule 4; Order LI., Rules 1 to 6.]

[The Rules referred to are as follows :—

ORDER XXIII.

4. When a party acts by a solicitor, service of any judgment or order in the nature of a decree, and of any interlocutory order, or any notice relating to any such order when directed to be served, may be made by or upon such solicitor as the case may be.

ORDER LI.

1. Where by these Rules any act may be done by any party, such act may be done either in person or by his solicitor or agent, if it can be legally done by an agent.

2a. Where a party acts by solicitor, service of any proceeding or document upon such solicitor, or delivery of the same at his office, or sending the same to him by post prepaid, shall be deemed to be good service upon the party for whom such solicitor acts, as upon the day when the same is so served or delivered, or upon which in the ordinary course of post it would be delivered, except in cases where by these Orders personal service upon a party is required. *Provided that the provisions of this Rule shall not extend to any default or judgment summons, nor except as provided by Ord. 7, r. 9c, to any ordinary summons.*

3. A solicitor acting for a party in any action or matter may give notice in writing, by post or otherwise to the registrar, and to the other party, or his solicitor, that he is so acting, whereupon service of any document, notice, or proceeding whatsoever authorised by these Rules to be served by or upon a solicitor so acting shall be served by or upon such solicitor accordingly, and he shall be deemed to be the solicitor acting for the party on whose behalf he has given such notice, until notice of change of solicitor has been duly given. No notice need be given under this Rule by a solicitor acting for the plaintiff where the plaint has been entered by such solicitor and the particulars duly signed by him.

4. Where a solicitor undertakes the service of any process, he shall make the necessary copies of each process, and the registrar shall seal the same and return them to the solicitor for service.

5. Any party who acts by solicitor shall be at liberty to change his solicitor without any order for that purpose, but when any such change is made he shall give twenty-four hours' notice in writing to the registrar and to the solicitor, if any, acting for any other party to the action or proceedings of such change, and of the name or firm and place of business of the new solicitor, and the registrar shall file the notice given to him; but until such notice is filed and a copy thereof served the former solicitor shall be continued as the solicitor of the party.

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6. Where by reason of the absence of any party, or from any other sufficient cause, the service of any summons (other than a default summons), notice, proceeding, or document cannot be made, the judge or registrar may, upon an affidavit showing grounds, make such order for substituted service, or for the substitution for service of notice by advertisement or otherwise, as may be just.]

Procedure where not otherwise provided for. *See* Tithe Rules, 57.

64. Where any matter or thing is not specially provided for under these Rules, the same procedure shall be followed and the same provisions shall apply, as far as practicable, as in a similar matter or thing under the County Courts Act, 1888, and the rules made in pursuance of that Act.

Record of Proceedings.—Special Register.

Record of proceedings before judge or arbitrator. Special register. Form 30.

65. Proceedings under the Act before the judge on an arbitrator appointed by him shall be recorded in the books of the Court in the manner in which other proceedings in the Court are recorded; and the registrar shall also keep a special register for the purposes of the Act, in which he shall record—

(*a*) A memorandum of every application made to the judge for the settlement of any matter by arbitration;

(*b*) A memorandum of every appointment of an arbitrator made by the judge or by a judge of the High Court;

(*c*) A memorandum of every proceeding taken in any arbitration before the judge or an arbitrator prior to the award;

(*d*) A memorandum of every appointment of a medical referee by the judge or arbitrator, and of his report, and if he is requested to attend any proceeding in the arbitration, of such request and attendance;

(*e*) A memorandum of every award made by the judge, or by an arbitrator appointed by him;

(*f*) A copy of every certificate under sub-section 4 of Section 1 of the Act given by the Court, or sent to the registrar from any other court;

(*g*) A memorandum of every special case submitted to the judge, and of the proceedings and order thereon;

(*h*) A memorandum of every judgment given by the Court of Appeal on any appeal;

(*i*) A copy of every memorandum sent to the registrar pursuant to paragraph 8 of the second schedule to the Act, and of the report (if any) of the medical referee annexed thereto, with a note stating whether such memorandum was recorded without further proof, or after inquiry, or by order of the judge;

(*j*) If such memorandum is recorded after inquiry, a memorandum of the inquiries made and of the result thereof;

(*k*) If such memorandum is recorded by order of the judge, a memorandum of the application to the judge, and of the order made thereon;

(*l*) A memorandum of the result of every taxation of costs under any such memorandum, or under any award or order;

(*m*) A memorandum of every application to rectify the register in respect of any memorandum, and of the proceedings and order thereon;

(*n*) A memorandum of every application to the judge or arbitrator, under paragraph 12 of the second schedule to the Act, to determine the amount of costs to be paid to a solicitor or agent, and of the proceedings and order thereon, and of the result of any taxation under such order;

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(*o*) A copy of every certified copy filed pursuant to Rule 60;

(*p*) A memorandum of every proceeding taken in the Court for the stay of any proceedings or the enforcement of any award, order, memorandum, or certificate, and of the result of such proceeding;

(*q*) A memorandum of every application to the judge for an order against insurers under Section 5 of the Act, and of the proceedings under such application, and the order made thereon;

(*r*) A memorandum of every sum paid into court and invested by the registrar;

(*s*) A memorandum of every application made to the Court with reference to any such sum, and of every order made on such application, and of the manner in which such sum is applied or disposed of;

(*t*) A memorandum of every application for transfer, and of the order thereon, and the proceedings under such order;

(*u*) The like memorandum as to every matter transferred to the Court as would have been recorded as to such matter if it had been originally commenced and prosecuted in the Court;

(*v*) A memorandum of any other matter which the judge shall order to be recorded with reference to any matter brought into or proceeding taken in the Court under the Act.

Matters, how distinguished.

Matters, how distinguished. *Conf.* Order II. Rule 8.

66. Every matter brought into the Court under the Act shall be intituled in the matter of the Act, and shall be distinguished by a separate number in addition to the number of the plaint (if any); and all documents filed and subsequent proceedings taken in the Court with reference to such matter shall be intituled in like manner, and shall be distinguished by the same number; and the entries made in the special register with respect to each such matter shall be entered together, and shall be kept separate from the entries with respect to any other matter.

Forms.

Forms in Appendix or like forms may be used. *See* Tithe Rules, 58.

67. The forms in the Appendix, where applicable, and where they are not applicable forms of the like character, with such variations as the circumstances may require, may be used in proceedings under the Act.

APPENDIX.

Form I.

Application for Arbitration by an Injured Workman with respect to the Compensation payable to him.

In the County Court of holden at

No. of Plaint

In the matter of the Workmen's Compensation Act, 1897.

No. of Matter

In the matter of an Arbitration between

A.B.
of (*address*)
(*description*) Applicant,

and

C.D. and Co., Limited,
of (*address*)
(*description*) Respondents.

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An Arbitration under the Workmen's Compensation Act, 1897, is hereby requested between A.B. and C.D. and Co., Limited, as to the amount of compensation payable to the said A.B. under the said Act, in respect of personal injury caused to the said A.B. by accident arising out of and in the course of his employment.

Particulars are hereto appended [*or* annexed].

PARTICULARS.

1. Name and address of injured workman.

2. Name, place of business, and nature of business of respondents.

3. Nature of employment of workman at time of accident, and whether employed under respondents or under contractors with them. [*If employed under contractors who are not respondents, name and place of business of contractors to be stated.*]

4. Date and place of accident, nature of work on which workman was then engaged, and nature of accident, and cause of injury.

5. Nature of injury.

6. Particulars of incapacity for work, whether total or partial, and estimated duration of incapacity.

7. Average weekly earnings during the twelve months previous to the injury, if the workman had been so long employed under the same employer, or if not, during any less period during which he had been so employed.

8. Estimated average amount which the workman is able to earn after the accident.

9. Payments not being wages received from employer in respect of the injury during the period of incapacity.

10. Amount of fine (if any) under any enactment relating to mines or factories applied for benefit of injured workman.

11. Amount claimed as compensation.

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PARTICULARS—*continued.*

12. Date of service of statutory notice of accident on respondents, and whether given before workman voluntarily left the employment in which he was injured. [*A copy of the notice to be annexed.*]

13. If notice not served, reason for omission to serve same.

The names and addresses of the applicant and his solicitor are:
Of the Applicant,
Of his Solicitor,
The name and address of the respondents to be served with this application are:

Dated this day of
(Signed)
Applicant.
[*Or*
Applicant's Solicitor.]

FORM 2.

Application for Arbitration by Legal Personal Representative of Deceased Workman on behalf of his Dependants, or by Dependants of Deceased Workman where no Legal Personal Representative, with respect to the Compensation payable in respect of the Injury to such Dependants, where Death has resulted from an Injury to the Workman, and the Settlement of questions as to who are Dependants, and the Apportionment and Application of such Compensation.

the County Court of holden at
No. of Plaint
In the matter of the Workmen's Compensation Act, 1897.
No. of Matter
In the matter of an Arbitration between
E.F.
of (*address*)
(*description*) Applicant,
and
C.D. and Co., Limited,
of *address*)
(*description*)
and
G.B.
of (*address*)
(*description*) Respondents.
[*or as the case may be; see Rule* 4].

An arbitration under the Workmen's Compensation Act, 1897, is hereby requested between E.F. , the legal personal representative of A.B., deceased, acting on behalf of the dependants of the said A.B.
[*or* between E.F. , a dependant of A.B. , deceased] and

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C.D. and Co., Limited, , and G.B. , who claims to be a dependant of the said A.B. ,

[*or as the case may be; see Rule* 4]

with respect to the compensation payable to the dependants of the said A.B. under the said Act, in respect of the injury caused to the said dependants by the death of the said A.B. , which resulted from injury caused to the said A.B. by accident arising out of and in the course of his employment, and the settlement of questions as to who are dependants and the apportionment and application of such compensation.

Particulars are hereto appended [*or* annexed].

PARTICULARS.

1. Name and late address of deceased workman.

2. Name, place of business, and nature of business of respondents from whom compensation is claimed.

3. Nature of employment of deceased workman at time of accident, and whether employed under respondents or under contractors with them. [*If employed under contractors who are not respondents, name and place of business of contractors to be stated.*]

4. Date and place of accident, nature of work on which deceased workman was then engaged, and nature of accident, and cause of injury.

5. Nature of injury to deceased workman, and date of death.

6. Earnings of the deceased workman during the three years next preceding the injury, if he was so long in the employment of the same employer, and if he was not so long in that employment, particulars of his average weekly earnings during the period of his actual employment under the said employer.

7. Amount of weekly payments (if any) made to the deceased workman under the Act.

8. Amount of fine (if any) under any enactment relating to mines or factories applied for benefit of deceased workman or his dependants.

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PARTICULARS—*continued.*

9. Name and address of applicant for arbitration.

10. Character in which applicant applies for arbitration, *i.e.* whether as legal personal representative of deceased workman or as a dependant, and if as a dependant, particulars showing how he is so.

11. Particulars as to the dependants of the deceased workman by whom or on whose behalf the application is made, giving their names and addresses, and descriptions and occupations (if any), and if infants, their respective ages, and stating whether they were wholly or partially dependent on the earnings of the deceased workman at the time of his death.

12. Particulars as to any persons claiming to be dependants, but as to whose claim a question arises, and who are therefore made respondents, with their names, addresses, and descriptions and occupations (if any).

13. Particulars of amount claimed as compensation, and of the manner in which the applicant claims to have such amount apportioned and applied.

14. Date of service of statutory notice of accident on respondents from whom compensation is claimed, and whether given before deceased workman voluntarily left the employment in which he was injured. [*A copy of the notice to be annexed.*]

15. If notice not served, reason for omission to serve same.

The names and addresses of the applicant and his solicitor are:

Of the Applicant,

Of his Solicitor,

The names and addresses of the respondents to be served with this application are:

C.D. and Co., Limited.

G.B.,

Dated this day of

(Signed) , Applicant.

[*Or* ,

Applicant's Solicitor.

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FORM 3.

Application for Arbitration as to who are Dependants, or as to the Amount payable to each Dependant, where the total amount Payable as Compensation to the Dependants of a deceased Workman has been agreed or ascertained.

In the County Court of holden at

No. of Plaint

In the matter of the Workmen's Compensation Act, 1897.

No. of Matter

In the matter of an Arbitration between

E.F.
of (*address*)
(*description*) Applicant,

and

C.D. and Co., Limited,
of (*address*)
(*description*)

and

G. H.,
of (*address*)
(*description*)

J.K.,
of (*address*)
(*description*)

and

L.M.,
of (*address*)
(*description*) Respondents.

[*or as the case may be; see Rule* 5].

An arbitration under the Workmen's Compensation Act, 1897, is hereby requested between E.F. , the legal personal representative of A.B. , deceased (acting on behalf of N.O., P.R., etc., , dependants of the said A.B.,), and C.D. and Co., Limited, and G.H., J.K., and L.M., , who are or claim to be dependants of the said A.B., .

[*or as the case may be; see Rule* 5]

to settle questions as to who are dependants of the said A.B., and as to the apportionment and application of the agreed [*or* ascertained] amount of compensation payable to the dependants of the said A.B. , under the said Act in respect of the injury caused to the said dependants by the death of the said A.B. , which resulted from injury caused to the said A.B. by accident arising out of and in the course of his employment.

Particulars are hereto appended [*or* annexed].

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PARTICULARS.

1. Name and late address of deceased workman.

2. Name and place of business of employers by whom compensation has been paid or is payable.

3. Date of accident to deceased workman, and date of death.

4. Agreed or ascertained amount of compensation to be paid to dependants of deceased workman.

5. Particulars as to whether the compensation money is still payable by the employers or has been paid by them, and if so, to whom, and in whose hands it now is.

6. Character in which the applicant applies for arbitration, *i.e.* whether as legal personal representative of deceased workman or as a dependant, and if as a dependant, particulars showing how he is so.

7. Particulars as to the dependants or persons claiming to be dependants by whom or on whose behalf the application is made, giving their names and addresses, and descriptions and occupations (if any), and if infants, their respective ages, and stating whether they were or claim to have been wholly or partially dependent on the earnings of the deceased workman at the time of his death.

8. The like particulars as to any dependants who are made respondents.

[NOTE.—*If there is a Legal Personal Representative, and he is not the Applicant, he must be made a Respondent.*]

9. Particulars as to any persons claiming to be dependants, but as to whose claim a question arises, and who are therefore made respondents,

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PARTICULARS—*continued.*

with their names, addresses, descriptions, and occupations (if any).	
10. Particulars of the manner in which the applicant claims to have the amount of compensation apportioned and applied.	

The names and addresses of the applicant and his solicitor are:

Of the Applicant,

Of his Solicitor,

The names and addresses of the respondents to be served with this application are:

C.D. and Co., Limited.

G.H.

I.K.

L.M.

[*or as the case may be*].

Dated this day of .

(Signed) ,

Applicant.

[*Or* ,

Applicant's Solicitor.

FORM 4.

Application for Arbitration by Legal Personal Representative of Deceased Workman with respect to the Compensation payable in respect of Expenses of Medical Attendance and Burial, or by Person to whom such Expenses are due, where Deceased leaves no Dependants.

In the County Court of holden at

No. of Plaint

In the matter of the Workmen s Compensation Act, 1897.

No. of Matter

In the matter of an Arbitration between

E.F.,
of (*address*)
(*description*) Applicant,

and

C.D. and Co., Limited,
of (*address*)
(*description*)
and
G.H.,
of (*address*)
(*description*) Respondents

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An arbitration under the Workmen's Compensation Act, 1897, is hereby requested between E.F. and C.D. and Co., Limited, , and G.H. , as to the compensation payable under the said Act in respect of the reasonable expenses of medical attendance on and the burial of A.B. , deceased, whose death resulted from injury caused to the said A.B. , by accident arising out of and in the course of his employment, and the apportionment and application of such amount.

Particulars are hereto appended [*or* annexed].

PARTICULARS.

1. Name and late address of deceased workman.

2. Name, place of business, and nature of business of respondents from whom compensation is claimed.

3. Nature of employment of deceased workman at time of accident, and whether employed under respondents or under contractors with them. [*If employed under contractors who are not respondents, name and place of business of contractors to be stated.*]

4. Date and place of accident, nature of work on which deceased workman was then engaged, and nature of accident, and cause of injury.

5. Nature of injury to deceased workman, and date of death.

6. Name and address of applicant for arbitration.

7. Character in which applicant applies for arbitration, *i.e.* whether as legal personal representative of deceased workman, or as a person to whom expenses in respect of which compensation is payable are due; and if the latter, particulars must be given of the circumstances under which the expenses are claimed to be due to the applicant.

8. Particulars as to any other persons who claim that expenses in respect of which compensation is payable are due to them, and who are therefore made respondents, with their names and addresses.

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PARTICULARS—*continued.*

9. Particulars of amount claimed as compensation, and of the manner in which the applicant desires such amount to be apportioned and applied.

10. Date of service of statutory notice of accident on respondents from whom compensation is claimed, and whether given before deceased workman voluntarily left the employment in which he was injured. [*A copy of the notice to be annexed.*]

11. If notice not served, reason for omission to serve same.

The names and addresses of the applicant and his solicitor are:

Of the Applicant,

Of his Solicitor,

The names and addresses of the respondents to be served with this application are:

C.D. and Co., Limited.

G.H.

Dated this day of .

(Signed) , Applicant.

[*Or* ,

Applicant's Solicitor.]

FORM 5.

Application for Arbitration with respect to the Review, Termination, Diminution, Increase, or Redemption of a Weekly Payment.

In the County Court of holden at

No. of Plaint

In the matter of the Workmen's Compensation Act, 1897.

No. of Matter

In the matter of an Arbitration between

C.D. and Co., Limited,
of (*address*)
(*description*) Applicants,

and

A.B.,
of (*address*)
(*description*) Respondent.

[*or as the case may be; see* Act, Sched. 1, pars. 12, 13.]

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An arbitration under the Workmen's Compensation Act, 1897, is hereby requested between C.D. and Co., Limited, and A.B.

[*or as the case may be; see* Act, Sched. 1, pars. 12, 18]

with respect to the review and termination [*or* diminution, increase, *or* redemption, *as the case may be*] of the weekly payment payable to the said A.B. under the said Act in respect of personal injury caused to the said A.B. by accident arising out of and in the course of his employment.

Particulars are hereto appended [*or* annexed].

PARTICULARS.

1. Name and address of injured workman.

2. Name and place of business of employers by whom compensation is payable.

3. Date and nature of accident.

4. Date of agreement, decision, award, or certificate fixing weekly payment, amount of such payment, and date from which it commenced.

5. Relief sought by applicant, whether termination, diminution, increase, or redemption.

6. Grounds on which termination, diminution, or increase is claimed.

The names and addresses of the applicants and their solicitor are:

Of the Applicants,

Of their Solicitor,

The name and address of the respondent to be served with this application are:

Dated this day of

(Signed) , Applicants

[*Or* , Applicants' Solicitor.]

FORM 6.

Notice to Applicant of Day upon which Arbitration will be proceeded with.

[*Heading as in Request for Arbitration.*]

TAKE NOTICE that the judge of this Court [*or* Mr. the arbitrator appointed by the judge of this Court] will proceed with the arbitration in this matter at on the day of at the hour of o'clock in the noon.

Dated this day of

To Registrar of the Court.

Of

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FORM 7.

Notice to Respondent of Day upon which Arbitration will be proceeded with.

[*Heading as in Request for Arbitration.*]

TAKE NOTICE that the judge of this Court [*or* Mr. the arbitrator appointed by the judge of this Court] will proceed with the arbitration applied for in the request and particulars a sealed copy of which is served herewith at on the day of at the hour of o'clock in the noon: and that if you do not attend either in person or by your solicitor at the time and place above mentioned such order will be made and proceedings taken as the judge [*or* arbitrator] may think just and expedient.

And further take notice that if you wish to disclaim any interest in the subject matter of the arbitration, or consider that the applicant's particulars are in any respect inaccurate or incomplete, or desire to bring any fact or document to the notice of the judge [*or* arbitrator], or intend to rely on any fact, or to deny (wholly or partially) your liability to pay compensation under the Act, you must file with me an answer, stating your name and address and the name and address of your solicitor (if any), and stating that you disclaim any interest in the subject matter of the arbitration, or stating in what respect the applicant's particulars are inaccurate or incomplete, or stating concisely any fact or document which you desire to bring to the notice of the judge [*or* arbitrator], or on which you intend to rely, or the grounds on and extent to which you deny liability to pay compensation.

Such answer, together with a copy thereof for the judge [*or* arbitrator], and a copy for the applicant and for each of the other respondents, must be filed with me ten clear days at least before the day of .

If no answer is filed, and subject to such answer, if any, the applicant's particulars and your liability to pay compensation will be taken to be admitted.

Dated this day of .

To

Of

Registrar of the Court.

FORM 8.

Answer by Respondents.

[*Heading as in Request for Arbitration.*]

TAKE NOTICE—

That the respondent, G.H., disclaims any interest in the subject matter of the above arbitration.

Or

That the respondents, C.D. and Co., Limited, state that the applicant's particulars filed in this matter are inaccurate or incomplete in the following particulars:

Or

That the respondents, C.D. and Co., Limited, desire to bring to the notice of the judge [*or* arbitrator] the following facts:

That the applicant, A.B., refuses to submit himself to medical examination

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as required by the respondents, C.D. and Co., Limited, in accordance with paragraph 3 of the 1st Schedule to the said Act [*or* obstructs the medical examination required by the respondents, C.D. and Co., Limited, in accordance with paragraph 3 of the 1st Schedule to the said Act]:

[*or as the case may be*]

Or

That the respondents, C.D. and Co., Limited, intend at the hearing of the arbitration to give in evidence and rely on the following facts:—

That no notice of the alleged accident was given to the respondents as required by Section 2 of the said Act;

That the claim for compensation with respect to the alleged accident was not made within six months from the occurrence of the accident [*or in case of death*, within six months of the death of the said A.B.] :

That a scheme of compensation [benefit *or* insurance] for the workmen of the respondents, C.D. and Co., Limited, in employment as has been duly certified by the Registrar of Friendly Societies, and such certificate has not been revoked, and the said C.D. and Co., Limited, contracted with the said A.B. by a contract which was in force at the date of the alleged accident that the provisions of the said scheme should be substituted for the provisions of the above-mentioned Act, and the said C.D. and Co., Limited, are consequently liable only in accordance with the said scheme:

Or

That the respondents, C.D. and Co., Limited, deny their liability to pay compensation under the above-mentioned Act in respect of the injury to A.B. mentioned in the applicant's particulars, and that the grounds on which they deny their liability are:—

That the employment of the said A.B. was not an employment to which the said Act applies; *or*

That the injury to the said A.B. was not caused by accident arising out of and in the course of his employment; *or*

That the injury to the said A.B. is attributable to the serious and wilful misconduct of the said A.B.

That at the time of the alleged accident the said A.B. was not immediately employed by the respondents C.D. and Co., Limited, but was employed by of , a contractor with the said C.D. and Co., Limited, in the execution by the said of work which was merely ancillary [*or* incidental] to, and was no part of or process in the trade or business carried on by the said C.D. and Co., Limited.

[*or as the case may be*]

And further take notice, that the names and addresses of the said respondents and their solicitors are

of the Respondents,
C.D. and Co., Limited,
of their Solicitors,

Dated this day of

(Signed)
Solicitors for the Respondents
C.D. and Co., Limited.

To the Registrar of the Court, and
To the Applicant, A.B., and
To the Respondents
(*if any, naming them*).

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FORM 9.

Notice by Respondent Admitting Liability, and Submitting to an Award for Payment of a Weekly Sum, or Paying Money into Court.

[*Heading as in Request for Arbitration.*]

TAKE NOTICE—

That the respondents, C.D. and Co., Limited, admit their liability to pay compensation in the above-mentioned matter.

And they hereby submit to an award for payment by them to the applicant, A.B., of the weekly sum of such weekly payment to commence as from the day of and to continue during the total or partial incapacity of the said A.B. for work, or until the same shall be ended, diminished, increased, or redeemed in accordance with the provisions of the above-mentioned Act.

And for payment by them to the said A.B. forthwith after the award of the amount of such weekly payments calculated from the day of until the first Saturday [*or other usual pay day*] after the date of the award, and for the payment thereafter of the said sum of to the said A.B. on Saturday [*or other usual pay day*] in every week.

[*Or*, And the said C.D. and Co., Limited, herewith pay into Court the sum of £ in satisfaction of such liability.]

Dated this day of .

(Signed)

Solicitors for the Respondents,
C.D. and Co., Limited.

To the Registrar of the Court, and

To the Applicant, A.B., and

To the Respondents
(*if any, naming them*).

FORM 10.

Notice of Filing of Submission to an Award.

[*Title as in Request for Arbitration.*]

TAKE NOTICE—

That the respondents, C.D. and Co., Limited, have this day filed with me a notice (copy of which is sent herewith) that they admit their liability to pay compensation in the above-mentioned matter, and submit to an award for payment by them to you of the weekly sum of .

If you elect to accept such weekly sum in satisfaction of your claim, you must send to the registrar of this Court, and to the said C.D. and Co., Limited, a written notice forthwith by post, or leave such notice at the office of the registrar, and at the residence or place of business of the said C.D. and Co., Limited, .

If you send such notice, the judge of this Court will, on application made to him, make an award directing payment of such weekly sum to you, and you will be liable to no further costs.

In default of such notice, the arbitration will be proceeded with; and if

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no greater weekly payment is awarded to you, you will be liable to be ordered to pay the costs incurred by the respondents subsequent to the receipt by you of this notice

Dated this day of

Registrar of the Court.

To the Applicant, A.B.

FORM 11.

Notice of Payment into Court.

[*Title as in Request for Arbitration.*]

TAKE NOTICE—

That the respondents, C.D. and Co., Limited, have this day filed with me a notice that they admit their liability to pay compensation in the above-mentioned matter, and they have paid into Court the sum of £ in satisfaction of such liability.

If you are willing to accept the sum so paid into Court in satisfaction of the compensation payable in the above-mentioned matter, you must send to the registrar of this Court, and to the said C.D. and Co., Limited, and to the other respondents [*or, where this notice is sent to a respondent*, to the applicant and the other respondents], a written notice forthwith by post, or leave such notice at the office of the registrar, and at the residence or place of business of the said C.D. and Co., Limited, and at the residence or place of business of each of the other respondents [*or* of the applicant and each of the other respondents].

If you and all the other respondents [*or*, If you and the applicant and all the other respondents] send such notice, and agree as to the apportionment and application of the said sum of £ , the judge of this Court will, on application made to him, make an award for such apportionment and application, and you will be liable to no further costs.

If you and all the other respondents [*or*, If you and the applicant and all the other respondents] send such notice, but do not agree as to the apportionment and application of the said sum of £ , the arbitration will be proceeded with as between you and such other respondents [*or*, as between the applicant and yourself and such other respondents].

In default of such notice being sent by you and all the other respondents [*or*, by the applicant and yourself and all the other respondents], the arbitration will be proceeded with: and if no greater amount than the said sum of £ is awarded as compensation, the parties who do not send such notice will be liable to be ordered to pay the costs incurred by the respondents, C.D. and Co., Limited, subsequent to the receipt by such parties of this notice, and also any costs incurred subsequent to the receipt of this notice by any parties who send notice of their willingness to accept the said sum of £ in satisfaction of the compensation payable in the above-mentioned matter.

Dated this day of

Registrar of the Court.

To the Applicant A.B.,

[*or* To the Respondent G.H.]
(*or as the case may be*).

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FORM 12.

Notice of Acceptance of Weekly Sum offered, or of Willingness to accept Sum paid into Court.

[*Heading as in Request for Arbitration.*]

TAKE NOTICE—

That the applicant, A.B. accepts the weekly sum offered by the respondents, C.D. and Co., Limited, in satisfaction of his claim in the above-mentioned matter [*or*, that the applicant E.F. [*or*, the respondent G.H.] is willing to accept the sum of £ paid into Court by the respondents, C.D. and Co., Limited, in satisfaction of the compensation payable in the above-mentioned matter].

But the applicant [*or* the said respondent, G.H.] will apply to the judge to include in his award an order directing the said respondents, C.D. and Co., Limited, to pay the costs properly incurred by the applicant [*or* the said respondent G.H.] before the receipt of notice of the offer of the said weekly sum [*or* of notice of payment of the said sum of £ into Court].

Dated this day of .

(Signed)

Applicant,

or

Respondent.

To the Registrar of the Court, and

To the Respondents, C.D. and Co. Limited, and

To the Applicant, A.B., and

To the Respondents
(*naming them*).

FORM 13.

Notice by Respondent to Third Parties

[*Heading as in Request for Arbitration.*

To Mr. , of (*address and description*)

TAKE NOTICE—That A.B. of, etc., , has filed a request arbitration (a copy whereof is hereto annexed) as to the amount of compensation payable by the respondents, C.D. and Co., Limited, to the said A.B. under the said Act in respect of personal injury caused to the said A.B. by accident arising out of and in the course of his employment.

The respondents, C.D. and Co., Limited, claim to be indemnified by you against their liability to pay such compensation, on the ground that at the time of the injury in respect of which compensation is claimed the said A.B. was not immediately employed by the said C.D. and Co., Limited, but was employed by you in the execution of work in respect of which the said C.D. and Co., Limited, had contracted with you for the execution thereof, by or under you, and that you would,

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independently of Section 4 of the said Act, have been liable to pay compensation in respect of such injury.

[*Or* on the ground that the injury for which compensation is claimed was caused under circumstances creating a legal liability on your part to pay damages in respect thereof]

[*or as the case may be*].

And take notice, that if you wish to dispute the applicant's claim as against the respondents, C.D. and Co., Limited, you must appear before the judge [*or* arbitrator] at the time and place mentioned in the notice a copy of which is hereunto annexed.

In default of your so appearing you will not be entitled in any future proceedings between the respondents, C.D. and Co., Limited, and yourself to dispute the validity of the award made in the same arbitration as to any matter which the judge [*or* arbitrator] has jurisdiction to decide in such arbitration as between the applicant and the respondents, C.D. and Co., Limited, whether such award is made by consent or otherwise.

Dated this day of .

(Signed) C.D. and Co., Limited.

To By

Secretary.

of *or*

Solicitors for the Respondents,
C.D. and Co., Limited.

FORM 14.

Award.

(i.) *In case of Application by Workman.*

[*Heading as in Request for Arbitration.*]

Having duly considered the matters submitted to me, I do hereby make my award as follows :—

1. I order that the respondents, C.D. and Co., Limited, do pay to the applicant, A.B., the weekly sum of as compensation for personal injury caused to the said A.B. on the day of , by accident arising out of and in the course of his employment as a workman employed by the said C.D. and Co. in [*state nature of employment*] such weekly payment to commence as from the day of , and to continue during the total or partial incapacity of the said A.B. for work, or until the same shall be ended, diminished, increased, or redeemed in accordance with the provisions of the above-mentioned Act.

2. And I order that the said C.D. and Co. do forthwith pay to the said A.B. the sum of £ being the amount of such weekly payments calculated from the day of until the day of [*the first Saturday or other usual pay day after the date of the award*] and do thereafter pay the said sum of to the said A.B. on Saturday (*or other usual pay day*) in every week.

3. And I order that the said C.D. and Co. do pay to the registrar

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of this Court, for the use of the applicant, his costs of and incident to this arbitration, such costs, in default of agreement between the parties as to the amount thereof, to be taxed by the registrar under column of the scales of costs in use in the County Courts, and to be paid by the said C.D. and Co. to the registrar within fourteen days from the date of the certificate of the result of such taxation.

Dated this day of .

Judge [*or* Arbitrator].

(ii) *In Case of Application by Dependants.*

[*Heading as in Request for Arbitration.*]

Having duly considered the matters submitted to me, I do hereby make my award as follows:

1. I order that the respondents, C.D. and Co., Limited, do pay the sum of £ to the dependants of A.B., late of , deceased, as compensation for the injury resulting to such dependants from the death of the said A.B. , which took place on the day of from injury caused to the said A.B. on the day of by accident arising out of and in the course of his employment as a workman employed by the said C.D. and Co., Limited, in [*state nature of employment*].

2. And I declare that the persons hereinafter named are entitled to share in such compensation as dependants of the said A.B. , that is to say,
J.B. the widow of the said A.B.
and K.B. an infant daughter of the said A.B.

3. And I declare that the respondent G.B. , the father of the said A.B. , is not entitled to share in such compensation as a dependant of the said A.B.

4. And I order that the said sum of £ be apportioned between the said J.B. and K.B. in the proportions following, that is to say:—
I apportion the sum of £ to or for the benefit of the said J.B., and the sum of £ to or for the benefit of the said K.B.

5. And I order that the said C.D. and Co., Limited, do pay the said sum of £ to the applicant, E.F., the legal personal representative of the said A.B. [*or if no legal personal representative*, to the registrar of this Court,] for the use of the said J.B. within fourteen days from the date of this award, and that the said C.D. and Co., Limited, do within the same period pay the said sum of £ apportioned to or for the benefit of the said K.B. to the registrar of this Court.

6. And I order that the said last-mentioned sum be invested by the registrar in his name in the Post Office Savings Bank for the benefit of the said K.B., and that the interest arising from such investment be from time to time, until further order, paid to the said J.B. to be by her applied for the maintenance, education, or benefit of the said K.B.

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7. And I order that the said C.D. and Co., Limited, do pay to the registrar of this Court, for the use of the applicants, their costs of and incident to this arbitration, such costs, in default of agreement between the parties as to the amount thereof, to be taxed by the registrar under column of the scales of costs in use in the County Courts, and to be paid by the said C.D. and Co., Limited, to the registrar within fourteen days from the date of the certificate of the result of such taxation.

[*Add directions (if any given) as to costs occasioned by claim of person claiming as a dependant whose claim is disallowed.*]

Dated this day of .

Judge [*or* Arbitrator].

(iii) *In case of Application by Person to whom Expenses of Medical Attendance or Burial are due.*

[*Heading as in Request for Arbitration.*]

Having duly considered the matters submitted to me, I do hereby make my award as follows:—

1. I order that the respondents, C.D. and Co., Limited, do pay the sum of £10 for or towards the expenses of medical attendance on and the burial of A.B., late of , deceased, who died on the day of from injury caused on the day of by accident arising out of and in the course of the employment of the said A.B. as a workman employed by the said C.D. and Co., Limited, in [*state nature of employment*].

2. And I declare that the persons hereinafter named are entitled to share in such compensation, that is to say:

The applicant, E.F. , in respect of charges amounting to £ due to him for medical attendance on the said A.B. and the respondent, G.H. , in respect of charges amounting to £ due to him for the burial of the said A.B. .

3. And I order that the respondents, C.D. and Co., Limited, do pay the said sum of £10 to the registrar of this Court within fourteen days from the date of this award, and that the said sum of £10 be apportioned between and paid to the said E.F. and G.H. in proportion to the amounts due to them respectively as aforesaid.

4. And I order that the said C.D. and Co., Limited, do pay to the registrar of this Court for the use of the applicant, E.F., and the respondent, G.H., their respective costs of and incident to this arbitration, such costs, in default of agreement between the parties as to the amount thereof, to be taxed by the registrar under column of the scales of costs in use in the County Courts, and to be paid by the said C.D. and Co., Limited, to the registrar within fourteen days from the date of the certificate of the result of such taxation.

Dated this day of

Judge [*or* Arbitrator].

[*Note.*—The above forms will serve as guides for framing awards in other cases of arbitration.]

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FORM 15.

Notice of Day upon which Special Case will be heard.

In the County Court of , holden at

[*Heading as in Special Case.*]

TAKE NOTICE that the judge of this Court will hear the special case stated by Mr. , the arbitrator in the above-named matter, at a Court to be holden at , on the day of at the hour of in the noon: and that if you do not attend in person or by your solicitor at the place and time above mentioned, such order will be made and proceedings taken as the judge may think just.

You may obtain a copy of the case upon application at my office and upon prepayment of the costs of such copy.

Dated this day of .

Registrar of the Court.

To [*The Applicant and Respondents*].

FORM 16.

Form of Memorandum under Paragraph 8 of Schedule II.

To the Registrar of the County Court of , holden at

In the matter of the Workmen's Compensation Act, 1897,

and

In the matter of an Arbitration between

A.B. of, etc., Applicant

and

C.D. and Co., Limited,

of, etc. Respondents

[*or, where the matter has been decided by agreement without arbitration,*

In the matter of an Agreement between

A.B. of, etc.,

and

C.D. and Co., Limited,

of, etc.,].

Be it remembered, that on the day of personal injury was caused to the said A.B. of, etc., who was a workman employed by C.D. and Co., Limited, of, etc., in [*state nature of employment*] , by accident arising out of and in the course of his employment:

And that on the day of the following agreement was come to by and between the said A.B. and the said C.D. and Co., Limited, that is to say:

[*or*, And that on the day of the following decision was given by a committee representative of the said C.D. and Co., Limited, and their workmen, having power to settle matters under the above-mentioned Act in the case of the said C.D. and Co., Limited, and their workmen; that is to say]:

[*or*, And that on the day of the following award was made

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and given by me, the undersigned , being an arbitrator agreed on by the said A.B. and the said C.D. and Co., Limited; that is to say]:

[*Here set out copy of agreement*,[1] *decision, or award.*]

[*Or, where death resulted from the accident,*

Be it remembered, that on the day of personal injury was caused to A.B. late of deceased, who was a workman employed by C.D. and Co., Limited, of, etc., in [*state nature of employment*] by accident arising out of and in the course of his employment, and that on the day of the said A.B. died as the result of such injury:

And that on the day of the following agreement was come to by and between C.B. G.B. etc., the dependants of the said A.B. within the meaning of the above-mentioned Act, and the said C.D. and Co., Limited, that is to say:

[*or*, And that on the day of the following decision was given by a committee representative of the said C.D. and Co., Limited, and their workmen, having power to settle matters under the above-mentioned Act in the case of the said C.D. and Co., Limited, and their workmen; that is to say]:

[*or*, And that on the day of the following award was made and given by me, the undersigned, being an arbitrator agreed on by C.B. G.B. , etc., , the dependants of the said A.B. within the meaning of the above-mentioned Act, and the said C.D. and Co., Limited, ; that is to say]:

[*Here set out copy of agreement*,[1] *decision, or award.*]

A copy of the report of Mr. , a medical referee appointed to report in the above-mentioned matter, is hereunto annexed [*add, if so,* The said Mr. attended the arbitration on the day of].

You are hereby requested to record this memorandum, pursuant to paragraph 8 of the second schedule to the above-mentioned Act.

Dated this day of .

[*To be signed—*

In the case of an agreement, by the parties or some or one of them, or by their or his solicitor on their or his behalf:

In the case of a decision by a committee, by the chairman and secretary on behalf of the committee:

In the case of an award, by the arbitrator.]

FORM 17.

Inquiry as to Genuineness of Memorandum.

In the County Court of , holden at

[*Heading as in Memorandum.*]

TAKE NOTICE, that a memorandum, copy of which is hereto annexed, has been sent to me for registration.

Such memorandum, which appears to affect you, is not signed by you or on your behalf.

I have therefore to request you to inform me in due course of post,

[1] For specimens of Agreements, see Appendix G.

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whether you admit the genuineness of the memorandum, or whether you dispute it, and if so, in what particulars.

If you do not inform me in due course of post that you dispute the genuineness of the memorandum, it will be recorded without further inquiry, and will be enforceable accordingly.

If you dispute its genuineness, it will not be recorded, except with your consent in writing, or by order of the judge of this Court.

Dated this day of .

Registrar of the Court.

To

FORM 18.

Notice Disputing Memorandum.

In the County Court of , holden at

[*Heading as in Memorandum.*]

TAKE NOTICE, that the undersigned C.D. and Co., of etc., dispute the genuineness of the memorandum sent to you for registration in the above-mentioned matter in the following particulars:

[*Here state particulars.*]

Dated this day of .

C.D. and Co., Limited,

by

Secretary.

[*Or* ,

Solicitors for C.D. and Co., Limited.]

To

The Registrar.

FORM 19.

Notice that Genuineness of Memorandum is disputed.

[*Heading as in last Form.*]

TAKE NOTICE, that the genuineness of the memorandum in the above-mentioned matter left with [*or* sent to] me by you is disputed by of , a party affected by such memorandum, but who has not signed the same, in the following particulars:

[*Here state particulars of dispute.*]

The memorandum will therefore not be recorded, except with the consent in writing of the said , or by order of the judge of this Court.

Dated this day of .

Registrar of the Court.

To

FORM 20.

Notice of Application for Registration of Memorandum or for Rectification of Register.

In the County Court of , holden at

[*Title as in the Memorandum.*]

TAKE NOTICE, that I intend to apply to the judge at on the day of , at the hour of o'clock in the noon [*in case of notice by solicitor*, on behalf of of for an order for the registration of the

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memorandum sent to the registrar in the above-mentioned matter [*or* for an order for the rectification of the memorandum recorded in the above-mentioned matter] by [*state particulars of rectification applied for*], and for consequential directions, and for costs.

Dated this day of .

Applicant.
[*Or* Applicant's Solicitor.]

To the Registrar of the Court
and to
and to Messrs.
(his [*or* their] solicitors).

FORM 21.

Notice of Application for Determination of Amount of Costs under Paragraph 12 of Schedule II. to the Act.

In the County Court of , holden at
[*Title as in Award or Memorandum.*]

TAKE NOTICE, that I intend to apply to the judge at on the day of at the hour of o'clock in the noon, to determine the amount of costs to be paid to me as solicitor [*or* agent] for you A.B. in the above-mentioned matter; and for an order declaring that I am entitled to a lien for such amount on or to deduct such amount from the sum awarded as compensation to you the said A.B. in the above-mentioned matter, and for consequential directions.

Dated this day of .

Applicant.

To the Registrar of the Court,
and to
A.B.
of

FORM 22.

Form of Certificate under Section 1, Sub-section 4.

In the County Court of , holden at
No. of plaint.

Between
A.B.,
of (*address*)
(*description*) Plaintiff

and

C.D. and Co., Limited,
of (*address*)
(*description*) , Defendants.

And in the matter of the Workmen's Compensation Act, 1897.

I hereby certify that on the day of the above-named plaintiff commenced the above-named action against the above-named defendants claiming

[*Here state claim of plaintiff in action.*]

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And that on the trial of the said action on the day of was determined that the injury in respect of which the plaintiff claimed damages in the said action was one for which the defendants were not liable in the said action, but that such defendants would have been liable to pay compensation in respect of such injury under the above-mentioned Act.

And that thereupon the said action was dismissed, but the Court, on the request of the plaintiff, proceeded to assess the compensation to which the defendants would have been liable to pay under the said Act.

And that the Court assessed such compensation at the sum of £ and directed [*state directions given as to payment of compensation, and directions, if any given, as to costs, and as to the deduction from the compensation of any costs which in the judgment of the Court were caused by the plaintiff bringing the action instead of proceeding under the Act*].

Dated this day of .

Registrar of the Court.

FORM 23.*

Execution on Award or Memorandum or Certificate.

In the County Court of , holden at

[*Title as in Award, Memorandum, or Certificate.*]

Whereas on the day of an award was made in the above-mentioned matter by the judge [*or* by Mr. , an arbitrator appointed by the judge] whereby it was ordered [*state operative parts of award*] [*or* whereas on the day of a memorandum was recorded in this Court of an agreement [*or* decision *or* award] come to [*or* given *or* made] in the above-mentioned matter, whereby it was agreed [*or* ordered] [*state operative parts of agreement, decision or award*] [*or* whereas on the day of a memorandum was recorded in this Court of a certificate given by the County Court of holden at to the effect that [*state operative parts of certificate*]:

And whereas default has been made in payment of the sum of £ payable by the said into Court [*or* to the said A.B.] according to the said award [*or* memorandum *or* certificate].

These are therefore [*as in ordinary executions*].

[*This form to be adapted to the circumstances of the case where execution is ordered to issue under Rule 47, paragraph (e) for costs.*]

FORM 24.

Notice of Application to stay Proceedings in Arbitration or suspend weekly Payments, under Schedule I., Paragraph 8, or Paragraph 11, and Rule 50.

Heading as in Request for Arbitration, or Award, or Memorandum or Certificate [*as the case may be*].]

TAKE NOTICE that I intend to apply to the judge [*or* to Mr. the arbitrator appointed in the above-mentioned matter] at on the day of at the hour of o'clock in the noon,

* See Form 23A in Workmen's Compensation Rules, 1900, in Appendix I.

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[on behalf of Messrs. C.D. and Co., Limited, of, etc., .] for an order staying the proceedings in the above-mentioned arbitration [*or* suspending the weekly payments awarded to you by the above-mentioned award, *or* memorandum *or* certificate] on the ground that you refuse to submit yourself to medical examination as required by me [*or* by the said C.D. and Co., Limited], in accordance with paragraph 3 [*or* paragraph 11] of the first schedule to the above-mentioned Act [*or* that you obstruct the medical examination required by me [*or* by the said C.D. and Co., Limited], in accordance with paragraph 3 [*or* paragraph 11] of the first schedule to the above-mentioned Act], and for consequential directions, and for costs.

Dated this day of .

To A.B., of (Signed) C.D. and Co., Limited,
and to Messrs. by Secretary.
his Solicitors [*Or*
Solicitors for C.D. and Co., Limited.]

FORM 25.

Affidavit on Summons against Insurers under Section 5 of the Act.

In the County Court of , holden at

[*Title as in Award, Memorandum, or Certificate.*]

I, A.B. of [*or* I, E.F., of
solicitor to A.B. of] make oath and say as follows:

1. On the day of an award was made in the above-mentioned matter by the judge [*or* by Mr. an arbitrator appointed by the judge] whereby it was ordered [*state operative parts of award*]
[*or* on the day of a memorandum was recorded in this Court of an agreement [*or* decision, *or* award, *or* certificate] come to [*or* given *or* made] in the above-mentioned matter whereby it was agreed [*or* determined *or* ordered] [*state operative parts of agreement, decision, award, or certificate*].

2. The sum of £ [*or* a weekly payment of from the day of *as the case may be*] still remains due [*or* payable] to me [*or* to the said A.B.] from or by the said C.D. under the said award [*or* memorandum *or* certificate].

3. The said C.D. is [*or* are] entitled to the sum [*or* weekly payment] of from of [*insert name and address of insurers*] n respect of the amount due [*or* payable] to me [*or* to the said A.B.] as aforesaid.

4. [*Here state particulars showing that the employer has become bankrupt, or made a composition or arrangement with his creditors, or, if a company, that the company has commenced to be wound up; stating, in case of an assignment, the names and addresses of the assignees, or in case of bankruptcy, the name and address of the official receiver or other trustee, or, in case of liquidation, the name and address of the provisional or other liquidator, so far as known to the deponent.*]

5. I [*or* the said A.B.] claim [*or* claims] to have by virtue of the

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said Act a first charge on the sum [*or* weekly payment] to which the said C.D. s [*or* are] entitled from the said (*insurers*) as aforesaid, for the amount so due [*or* payable] to me [*or* him], and claim [*or* claims] that the said may be ordered to pay the said sum, or so much thereof as may be sufficient to satisfy the amount so due to me [*or* the said A.B.] into Court, to be invested or applied for my [*or* his] benefit [*or, in the case of a weekly payment*, that the said may be ordered to pay the said weekly payment to me [*or* him].]

Sworn, etc.

FORM 26.

Summons to Insurers.

In the County Court of , holden at

No. of plaint.

[*Title as in Award, or Memorandum, or Certificate.*]

Insurers.

[*Insert here name, address, and description of Insurers.*]

Whereas [*recite award, or memorandum, or certificate, as in affidavit*].

And whereas the said A.B. has filed an affidavit in this Court, stating that the sum of £ [*or* a weekly payment of from the day of [*as the case may be*] still remains due [*or* payable] to him from or by the said C.D. under the said award [*or* memorandum, *or* certificate]:

And that the said C.D. is [*or* are] entitled to the sum [*or* weekly payment] of from you in respect of the amount due or payable to the said A.B. as aforesaid:

And that [*Here repeat allegations in affidavit as to bankruptcy, composition, arrangement, or winding up*].

And that the said A.B. claims by virtue of the said Act to have a first charge on the sum [*or* weekly payment] to which the said C.D. is [*or* are] so entitled from you as aforesaid, and claims that you may be ordered to pay the said sum, or so much thereof as may be sufficient to satisfy the amount so due to the said A.B., into Court, to be invested or applied for his benefit [*or, in the case of a weekly payment*, that you may be ordered to pay the said weekly payment to him]:

You are therefore hereby summoned to appear at a Court to be holden at , on the day of , at o'clock in the noon, to show cause why an order should not be made upon you for the payment into Court of the sum to which the said C.D. is [*or* are] entitled from you as aforesaid or so much thereof as may be sufficient to satisfy the amount so due to the said A.B. [*or* for the payment by you of the said weekly payment to the said A.B.]:

And take notice, that from and after the service of this summons upon you such sum [*or* weekly payment] is attached to answer the sum [*or* weekly payment] payable to the said A.B. as aforesaid, and that if you shall pay the said sum [*or* weekly payment] to the said C.D. or otherwise dispose of the same you will be liable to be dealt with for contempt.

Dated this day of .

To

[*the Insurers*].

Registrar of the Court.

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FORM 27.

Notice to Employer or his Assignee, or to Official Receiver or Trustee in Bankruptcy, or Liquidator, of Issue of Summons to Insurers.

[*Title as in Summons to Insurers.*]

TAKE NOTICE, that a summons, a sealed copy of which is served herewith, has been issued in the above-mentioned matter, and that the judge [or registrar] of this Court has directed that notice of the issue of such summons shall be given to you.

AND FURTHER TAKE NOTICE, that the hearing of the said summons will be proceeded with at on the day of at o'clock in the noon, and that if you do not attend, either in person or by your solicitor, at the place and time above mentioned, such order will be made and proceedings taken as the judge may think fit.

Dated this day of

To Registrar of the Court.

[*The Employer or his Assignee, or the Official Receiver or other Trustee in Bankruptcy, or the Provisional or other Liquidator.*]

FORM 28.

Order against Insurers.

[*Title as in Summons.*]

Whereas [*recite award or memorandum or certificate, as in affidavit*].

And whereas the said A.B. having filed an affidavit [*recite affidavit as in summons*] the said were summoned to appear before the Court this day and to show cause why an order should not be made on them for the payment into Court by them of the sum to which the said C.D. is [*or* are] entitled from them as aforesaid, or so much thereof as might be sufficient to satisfy the amount so due to the said A.B. [*or* for the payment by them of the said weekly payment to the said A.B.].

Now the said having failed to appear before the Court this day [*or* having appeared before the Court this day and failed to shew cause why they should not be ordered to make such payment as aforesaid]

It is ordered that the said do within fourteen days from the date of this order pay to the registrar of this Court the sum of £ to which the said C.D. is [*or* are] entitled from them in respect of the amount due to the said A.B. under the said award [*or* memorandum *or* certificate].

[*Or*, It is ordered that the said do within fourteen days from the date of this order pay to the registrar of this Court for the use of the said A.B. the sum of £ , being the amount to which the said C.D. is [*or* are] entitled from them in respect of the weekly sum payable to the said A.B. under the said award [*or* memorandum *or* certificate] from the day of to the day of .

And that the said do thereafter until further order pay to the said A.B. the weekly sum of , being the amount to which the said C.D. is [*or* are] entitled from the said in respect of the weekly sum payable to the said A.B. under the said award [*or* memorandum *or* certificate].

[*Add Directions as to Investment and Application of Money ordered to be paid into Court and as to Costs.*]

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FORM 29.

Execution against Insurers.

In the County Court of , holden at
[*Title as in Order against Insurers.*]

Whereas on the day of , it was ordered [*recite operative parts of order against insurers*].

And whereas default has been made in payment of the sum of £ payable into Court under the said order [*or* payable to the said A.B. under the said order]:

These are therefore, etc.—[*as in ordinary executions*].

FORM 30.

Register.

The Workmen's Compensation Act, 1897.

Register.

No. of Matter.	Title.	Date of Proceedings.	Nature.
1.	In the matter of arbitration between A.B. of etc., Applicant, and C.D. and Co., Limited, of, etc., Respondents.	Oct. 11, 1898	Request for arbitration filed, and copy sent to judge.
		Oct. 20, 1898	Appointment of Mr. as arbitrator.
		Oct. 24, 1898	Copy request sent to arbitrator.
		Oct. 28, 1898	Day for arbitration fixed.
		Oct. 28, 1898	Notice of day fixed sent to applicant, and notice with copy request sent to respondents by registered post.
		Nov. 4, 1898	Respondents' answer filed; copies sent to arbitrator and applicant.
		Nov. 6, 1898	Application by applicant for discovery; order made.
		Nov. 12, 1898	Respondents' affidavit filed.
		Nov. 13, 1898	Five subpœnas issued on application of applicant's solicitor.
		Nov. 16, 1898	Arbitration held; Mr. appointed as medical referee to report; further hearing adjourned.

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No. of Matter.	Title.	Date of Proceedings.	Nature.
		Nov. 23, 1898	Report of medical referee received and forwarded to arbitrator; notice given to the parties.
		Dec. 13, 1898	Further hearing. Award made as follows (enter minute of award).
		Dec. 20, 1898	Costs of applicant taxed at £ .
		Jan. 3, 1899	£ for costs paid into Court by respondents.
		Jan. 10, 1899	£ for costs paid to applicant's solicitor.
2.	In the matter of an agreement between A.B., of and E.F. and Co., Limited, of etc.	Jan. 7, 1899	Memorandum of agreement as to compensation, signed by solicitor of A.B., left to be recorded.
		Jan. 8, 1899	Inquiry as to genuineness sent by post to E.F. and Co., Limited.
		Jan. 10, 1899	Letter received from E.F. and Co., Limited, disputing genuineness.
		Jan. 10, 1899	Notice sent to A.B.'s solicitor, that genuineness is disputed, and that Memorandum will not be recorded without consent in writing or E.F. and Co., Limited, or order of Judge.
		Jan. 15, 1899	Application on behalf of A.B., that Memorandum be recorded.
		Jan. 31, 1899	Application heard, and order made that Memorandum be recorded with alterations.
		Feb. 2, 1899	Memorandum recorded as follows [set out Memorandum].
		Feb. 13, 1899	Costs of A.B. taxed and allowed at £
		Mar. 1, 1899	Execution issued for costs.
			etc., etc., etc.

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We, Alfred Martineau, Henry J. Stonor, Richard Harington, William L. Selfe, and William Cecil Smyly, being the five judges of the County Courts appointed for the making of Rules under Section one hundred and sixty-four of the County Courts Act, 1888, having made the foregoing Rules of Court, pursuant to paragraph ten of the Second Schedule to the Workmen's Compensation Act, 1897, do hereby certify the same under our hands, and submit them to the Lord Chancellor accordingly.

ALFRED MARTINEAU.
HENRY J. STONOR.
RICHARD HARINGTON.
WM. L. SELFE.
WILLIAM CECIL SMYLY.

I allow these Rules,

HALSBURY, C.

The 27th of May 1898.

APPENDIX C

MEDICAL REFEREES

HOME OFFICE MEMORANDUM, DATED 19TH APRIL 1898

Duties.—The principal duty of the medical referees will be to act as the advisers in medical matters of the committees, arbitrators, and County Court judges, who are empowered to decide all questions arising in proceedings under the Act. For this duty they will be paid by the Treasury.

The ordinary procedure will be as follows: If, after hearing the evidence brought by both sides, doubt remains upon some medical point material to the case, the committee, arbitrator, or judge may, at their discretion, make a reference to the referee directing him to examine the injured workman and to make a written report on a specified question or questions. As a rule, the applicant will be required to attend the referee for examination at a time and place to be fixed by the referee; but in some instances, where the workman is unfit to travel, it will be necessary for the referee to visit him. In all cases the referee will make, in the first instance, a written report, answering the question or questions propounded by the committee, judge or arbitrator, Only in cases of special difficulty, before a County Court judge or County Court arbitrator, will the referee, after his written report has been considered, be asked to attend at a subsequent hearing to be held at a day and hour fixed by arrangement with him.

There will further be some cases in which applications will be made to the medical referees directly by the workmen. In certain circumstances a workman who is in receipt of an allowance under the Act is entitled to submit himself for examination to a referee for the purpose of obtaining a certificate

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as to his condition, which will be conclusive evidence in an arbitration under the Act.

Distribution of Appointments.—The appointments will be made according to the County Court circuits, referees being appointed for each of the fifty five circuits into which England and Wales are divided. According to the circumstances of each circuit it will either be sub-divided, and one or more of the referees assigned to each district, or arrangements will be made by which the referees will take the cases arising in the circuit according to a fixed rota. This arrangement will not, however, be binding on the County Court judge or County Court arbitrator, who is left free in each case to select such of the referees for the circuit as he sees fit, though he will probably in many cases be guided by the general arrangement.

Similar arrangements will be made for Scotland and Ireland, but the details are not yet settled.

In the first instance it is probable that only one or two referees will be appointed for some of the circuits, the ultimate arrangement being left to be determined when experience shows what is the number and distribution of the cases arising under the Act. For the same reason all appointments made will, in the first instance, be provisional and subject to revision if experience of the working of the Act should show that any rearrangement of duties or of the mode of payment is required.

Qualification.—The Secretary of State, accepting and fully concurring in the recommendations of a committee appointed by him, which has examined the whole subject with great care, and has had the advice both of County Court judges and of high medical authorities, deems it essential that the referees should be men of independent position and high standing in their profession, so as to command the confidence of all parties in disputes under the Act; and should, moreover, have such experience of the class of questions arising as will enable them to decide with authority points in which there may be divergence of medical evidence.

Other things being equal, preference would therefore be given to those holding important hospital appointments, or having had other special opportunities of gaining wide experience of accidents and their consequences; and to those who are not closely identified, by the nature of their practice or otherwise, with the classes affected by the Act.

Most of the cases arising under the Act will be of a surgical character, and the majority of the referees must therefore be selected with special regard to this circumstance; but the Secretary of State will, where necessary, make provision also for cases of other kinds, whether purely medical, or involving questions in the ophthalmic or other special branches of practice.

The fee for the examination of a workman in receipt of an allowance, who submits himself voluntarily, is payable, not by the Treasury, but by the workman, who may be required to pay a reasonable fee before the examination is made.

Applications for the appointments should be addressed to the Home Secretary, and should be sent under cover to the Private Secretary to the Secretary of State, Home Office, London, bearing on the envelope the words 'Medical Referee,' and should state the applicant's qualifications, age, etc., his residence, and the County Court circuit to which he wishes to be attached.

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MEDICAL REFEREES.

REGULATIONS, DATED MAY 2, 1898, MADE BY THE SECRETARY OF STATE AND THE TREASURY AS TO THE APPOINTMENT AND PAYMENT OF MEDICAL REFEREES IN ENGLAND AND WALES.

I, the Right Honourable Sir Matthew White Ridley, Baronet, one of Her Majesty's Principal Secretaries of State, and We, the Lords Commissioners of her Majesty's Treasury, in pursuance of the power conferred on us by the Workmen's Compensation Act, 1897, Schedule II., paragraph (13), hereby make the following regulations :—

Definitions.

1. In these regulations—

Sched. II. (13.) (i) 'Medical Referee' means a legally qualified medical practitioner appointed by the Secretary of State for the purposes of the Workmen's Compensation Act, 1897.

Sched. II. (13.) (ii) 'Reference' means the appointment of a medical referee by a committee, arbitrator, or judge to report on any matter material to any question arising in an arbitration under the Workmen's Compensation Act, 1897.

Sched. II. (1.) (iii) 'Committee' means a committee representative of an employer and his workmen, with power to settle matters under the Workmen's Compensation Act, 1897, in the case of the employer and workmen.

Sched. II. 2.) (iv) 'Agreed Arbitrator' means a single arbitrator agreed on by the parties to settle any matter which under the Workmen's Compensation Act, 1897, is to be settled by arbitration.

Sched. II. (2.) (v) 'Appointed Arbitrator' means a single arbitrator appointed by the judge.

(vi) 'Judge' means County Court Judge.

Sched. II. (9.) (vii) The words 'district in which the case arises' mean the County Court district in which all the parties concerned reside, or, if they reside in different districts, the district in which the accident occurred, subject to any transfer made under rules of court.

Conditions of Reference.

2. Before making any reference, the committee, arbitrator, or judge shall be satisfied, after hearing all medical evidence tendered by either side, that such evidence is either conflicting or insufficient on some matter which seems material to a question arising in the arbitration, and that it is desirable to obtain a report from a medical referee on such matter.

Form and Mode of Reference.

3. Every reference shall be made in writing and shall state the matter on which the report of the medical referee is required, and the question arising in the arbitration to which such matter seems to be material. Such reference shall be in accordance with the form prescribed in the schedule to these regulations, or as near thereto as may be.

Form A.

The reference shall be accompanied by a general statement of the medical evidence given on behalf of the parties; and if such evidence has been given before a committee or an agreed arbitrator, each medical witness shall sign

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the statement of his evidence, and may add any necessary explanation or correction.

4. On making the reference to the medical referee, the committee, arbitrator, or judge shall make an order in the form prescribed in the schedule, directing the injured workman to submit himself for examination by the medical referee. Before making such order they shall inquire whether he is in a fit condition to travel for the purpose of examination, and if satisfied that he is in a fit condition they shall by the same order direct him to attend at such time and place as the referee may fix. Form B.

It shall be the duty of the injured workman to obey any such order.

If the committee, arbitrator, or judge is satisfied that the workman is not in a fit condition to travel, they shall so state in the reference.

5. The reference shall be signed, if made by a committee, by the chairman and secretary of the committee; if made by an agreed arbitrator, by the arbitrator; if made by a judge or an appointed arbitrator, by the judge or arbitrator, or by the registrar of the county court in which the arbitration is pending.

6. Where there has been a previous reference in any case, any subsequent reference in the same case shall, if possible, be accompanied by the previous report of the medical referee.

7. Where the reference is made by a committee or agreed arbitrator, it shall be forwarded to the registrar of the county court of the district in which the case arises.

Selection of Medical Referee.

8. (1) In the case of a reference by a committee or agreed arbitrator the medical referee shall be one of those appointed by the Secretary of State for the county court circuit which includes the district in which the case arises, and shall, except as provided in Regulation 10,

(a) If the circuit has been sub-divided and medical referees have been appointed for each sub-division, be one of those appointed for the sub-division which includes the district in which the case arises;

(b) If a rota has been established either for the circuit or for a sub-division of the circuit, be selected in accordance with the rota.

(2) In the case of a reference by a judge or by an appointed arbitrator, the medical referee shall be one of those appointed by the Secretary of State for the circuit.

9. It shall be competent for a committee or an agreed arbitrator, without naming a medical referee, to address the reference in general terms to 'one of the medical referees appointed by the Secretary of State for the purposes of the Workmen's Compensation Act, 1897.'

10. Where there has been a previous reference in any case, any subsequent reference in the same case shall, if possible, be made to the same referee.

Duties of Registrar.

11. (1) In the case of a reference by a committee or agreed arbitrator, the registrar on receiving the reference—

(a) Shall see that the reference is in accordance with these regulations and if it is not shall return it for amendment;

(b) Shall, if no medical referee is named in the reference, insert the name of the medical referee proper to be appointed;

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(c) Shall, when the reference is in accordance with these regulations, countersign and seal it, and forward it forthwith to the medical referee.

(2) In the case of a reference by a judge or an appointed arbitrator, the registrar of the court in which the arbitration is pending shall sign (or countersign) and seal it, and forward it forthwith to the medical referee.

Form D. 12. The registrar shall keep a record in the form prescribed in the schedule to these regulations of all references forwarded by him, and shall send the same to the Secretary of State at the end of each quarter.

13. The registrar, on receiving a report from a medical referee under Regulation 17, shall forthwith file a copy at the court and transmit the report to the committee, arbitrator, or judge by whom the reference was made.

If the committee, arbitrator, or judge shall direct that the parties be at liberty to inspect the report, the registrar shall on receiving notice of such direction permit such inspection to be made during office hours, and shall on the application and at the cost of any party furnish him with a copy of the report or allow him to take a copy thereof.

14. When a medical referee attends under Regulation 19, the registrar shall certify in the record of references which he is required to keep under Regulation 12 that the attendance was at the special request of the judge or appointed arbitrator.

Report of Medical Referee.

15. The medical referee shall not accept any reference unless signed by the judge, appointed arbitrator, or registrar, and sealed with the seal of the county court.

Form C. 16. The medical referee shall, on receipt of a reference duly signed, appoint a time and, in cases where the injured workman is able to travel, a place for the examination of the workman, and shall send him notice accordingly.

17. The medical referee shall give his report in writing, and shall forward it to the registrar from whom he received the reference.

18. The committee, arbitrator, or judge may, by request signed and forwarded in the same manner as the reference, remit the report to the medical referee for further statement on any matter to be specified in such request.

Personal Attendance of Medical Referee.

19. In any case of special difficulty the judge, or appointed arbitrator, may require the attendance of the medical referee at any proceedings in the arbitration subsequent to the receipt of the report, at a date and hour to be arranged, and the medical referee shall attend accordingly, but this regulation shall not authorise the medical referee being called as a witness.

Fees.

20. The following shall be the scale of fees to be paid to the medical referees :—

(i) For a first reference, to include examination of the injured workman and written report .	2 guineas.
(ii) For a further statement under Regulation 18 on any matter not covered by the original reference . . .	1 guinea.

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(iii) For a second or subsequent reference to the same referee in a further arbitration on the same case, to include examination, if necessary, and written report . . . . . 1 guinea.

(iv) Where a medical referee attends at the request of the county court judge or appointed arbitrator, for such attendance . . . . . 3 guineas.

(v) Where in order to examine the injured workman or to attend on the county court judge or arbitrator the medical referee is compelled to travel to a place distant more than two miles from his residence or such other centre as may be prescribed by the Secretary of State, in addition to the above fees—5s. for each mile distant from such residence or centre.

21. The medical referee shall send to the Home Office at the end of each quarter a statement, in the form prescribed in the schedule to these regulations, of the fees due to him for the quarter under these regulations. Form E

22. In cases where a claim is made under Regulation 20 (v) in respect of an examination of an injured workman, the medical referee, in submitting his quarterly statement under Regulation 21, shall certify the distance of the place where the examination was made from his residence or other prescribed centre.

23. These regulations shall come into force on the 1st day of July, 1898, and shall apply to England and Wales.

M. W. Ridley,
One of Her Majesty's Principal
Secretaries of State.

H. T. Anstruther,
W. H. Fisher,
Two of the Lords Commissioners of
Her Majesty's Treasury.

2nd May 1898.

Schedule.

Form A.

Reference to a Medical Referee.

In the matter of the Workmen's Compensation Act, 1897,

and

In the matter of an Arbitration between—

A.B.
Address
Description Applicant,

and

C.D.
Address
Description Respondent.

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As the case may be:

(a) We, a committee representative of and his workmen, and empowered to arbitrate in the matter arising under the Workmen's Compensation Act between *A.B.* and *C.D.*;

(b) I, , an arbitrator agreed upon by *A.B.* and *C.D.* to arbitrate in the matter arising between them under the Workmen's Compensation Act, 1897;

(c) I, , Judge of County Courts;

(d) I, , arbitrator appointed by a Judge of County Courts,

having heard the evidence tendered by both parties, hereby certify that in our (*or* my) opinion the medical evidence given before us (*or* me) is conflicting (*or* insufficient) on a matter which seems to us (*or* me) to be material to a question arising in the above-mentioned arbitration, and that it is desirable to obtain a report from a medical referee on such matter, as follows:—

(A) On the day of personal injury was (*or* is alleged to have been) caused to *
by accident arising out of and in the course of his employment, under the following circumstances:—
†

(B) The matter on which we are (*or* I am) satisfied that it is desirable to obtain a report is—

(C) Such matter seems to be material to the following question arising in the arbitration, viz.:—

We (*or* I) therefore appoint ‡
one of the medical referees appointed by the Secretary of State for the purposes of the Workmen's Compensation Act, 1897, to examine the said § and to report to us (*or* me) on the matter specified above.

A statement of the medical evidence given before us (*or* me) is appended.

We are (*or* I am) satisfied that the said § , who is now at , is in a fit condition to travel for the purpose of being examined, and he has been directed to attend on the referee for examination at such time and place as shall be fixed by the referee; *or* does not appear to be in a fit condition to travel for the purpose of being examined.

The referee is requested to forward his report to—

The Registrar,
County Court Office,
on or before the day of

Dated this day of

(Signed)
**
or On behalf of the Committee.

Chairman / *Secretary* } *of Committee.*

Signature of Registrar and Seal of Court.

A previous reference was made to a medical referee in this case on the , 189 , and a copy of the report then given is attached.

* Insert name of injured workman.

† Here state the facts of the accident as ascertained from the evidence.

‡ The name may, under Regulation 9, be left in blank to be inserted by the Registrar.

§ Insert name of injured workman.

** For signature of judge or arbitrator.

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FORM B.

Order on injured workman to submit himself for examination by Medical Referee.

(*Title as in reference.*)

To *A.B.* *Address.*

of *Description.*

TAKE NOTICE—

That the Committee (*or* arbitrator, *or* judge) have (*or* has) appointed one of the medical referees under the Workmen's Compensation Act, 1897, to examine you for the purposes of the above-mentioned arbitration, and to report to them (*or* him).

You are hereby required to submit yourself for examination by such referee,* and to attend for that purpose at such time and place as may be fixed by him.

* Strike out from 'and to attend' when injured workman does not appear to be in a fit condition to travel.

Dated this day of

(*To be signed in the same manner as reference.*)

FORM C.

Notice by Medical Referee to injured Workman.

Workmen's Compensation Act, 1897.

To *A.B.*

I hereby give you notice that I have been appointed to examine and report on your case under the above-named Act, and that I propose to make such examination at on the day of at o'clock.

Signed *Medical Referee.*

FORM D.

Record of references to be kept by Registrar.

County Court Circuit . District . Name of Registrar .

For quarter ended .

Number of Reference.	Names of Parties.	Workman's Employment.	Date on which Reference received or made.	By whom made †	Whether workman directed to attend on Medical Referee, or not.	Medical Referee appointed.	Date and number of previous Reference in same case, if any.

† Here say whether committee, agreed arbitrator, county court judge, or appointed arbitrator.

I hereby certify that the medical referee attended at , on , with respect to reference No. , at the special request of

Endorsement to be made on back of form.

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FORM E.

Medical Referee's statement of fees.

Number.	Names of Parties.	Date on which Reference received.	Registrar from whom received.	Date and place of Examination.	Date on which Report sent.	Date of attendance, if any, on Judge or Arbitrator.	Amount of Fees under each of the headings in Regulation 20.				
							(i.)	(ii.)	(iii.)	(iv.)	(v.)
							£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
1.	A. B. and C. D.	10 July 1898.									
2.	E. F. and G. H.	6 Sept. 1898.									
						£					
							Total . £ s. d.				

† Endorsement to be made on back of statement.

† I hereby certify that I examined the applicant on , at , which is distant miles from my residence or prescribed centre.

Signed

APPENDIX D

RULES OF THE SUPREME COURT

JULY 1898

ORDER LIV. Rule 1, A.

3. An application for the appointment of a new arbitrator under paragraph 7 of the second schedule of 'The Workmen's Compensation Act, 1897,' shall be made by summons.

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ORDER LVIII. Rule 20.

Appeals under the Workmen's Compensation Act, 1897, 60 and 61 Vict. c. 37, Sched. II. par. 4.

4. The following provisions shall apply to appeals to the Court of Appeal from decisions of judges of the County Courts on questions of law under the Workmen's Compensation Act, 1897:—

(a) Every such appeal shall be by notice of motion in accordance with Order LIX, Rule 10; and such notice of motion shall be served and the appeal set down under Order LVIII, Rule 8, within the time limited by Order LIX, Rule 12.

(b) It shall be the duty of the party appealing to apply to the judge of the County Court for a signed copy of the note made by him of any question of law raised before him, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision on the question or matter submitted to him, and to furnish such copy for the use of the Court of Appeal; and such copy shall be used and received at the hearing of the appeal. If such notes are not produced the Court of Appeal shall have power to hear and determine the appeal upon any other evidence or statement of what occurred before the judge of the County Court which the Court of Appeal may deem sufficient.

(c) Order LIX, Rules 14 and 16, shall apply to any such appeal, with the substitution of the Court of Appeal for the High Court.

(d) Subject to the foregoing provisions, the rules for the time being in force with respect to appeals from the High Court to the Court of Appeal shall, so far as practicable, apply to and govern appeals under the said Act to the Court of Appeal.

5. These rules may be cited as the Rules of the Supreme Court, July 1898, or separately according to their respective headings, with reference to the Rules of the Supreme Court, 1883; and they shall come into operation on the 24th day of October 1898.

APPENDIX E

FORM I.

Notice of Injury.

In the matter of the Workmen's Compensation Act, 1897.

To

Take notice that A.B. of was on the day of injured by an accident arising out of and in the course of his employment by you, in consequence of [*Here state the cause of injury*].

Dated the day of 19

Signed

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N.B. This notice can be given either by the injured man himself, or by any one on his behalf.

It must give the name and address of the person injured, and state in ordinary language the cause of the injury and the date at which it was sustained (Sec. 2 (2)).

FORM I.

Claim for Compensation by Workman.

In the matter of the Workmen's Compensation Act, 1897.

To

Take notice that of claims compensation for injuries received by him through an accident arising out of and in the course of his employment by you on the day of 19 of which due notice has been given you.

He claims the sum of per week during incapacity from the day of 19 .

Dated the day of 19 .

Signed

N.B. This claim for compensation can be made either by the injured workman himself, or by any one on his behalf, but it must be made within six months from the date of the accident.

APPENDIX F

TIME TABLE

Notice of Accident.	To be given *as soon as practicable* after the happening thereof, and before the workman has voluntarily left the employment (Sec. 2 (1)).
Claim for Compensation.	To be made *within six months* from occurrence of accident (Sec. 2 (1)).
Application for Arbitration.	To be filed *at any time* after claim for compensation has been made (*Powell* v. *Main Colliery Co.* p. 42).
Fixing day for Arbitration.	Such day must be fixed so as to allow copies of the request and particulars to be served on the respondents at least *fifteen clear days* before the day so fixed. (Rule 13 (1)).
Service of copies of request and particulars on Respondents.	When service effected otherwise than by a bailiff, a copy of document served, with date and mode of service endorsed thereon, must be delivered to the Registrar within three clear days after date of service (Rule 15 (3)).

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TIME TABLE—*continued.*

Answer by Respondents.	Respondent must file his answer *ten clear days* before the day fixed for proceeding with the arbitration (Rule 17 (1)).
Notice that Respondent submits to an award, or has paid money into Court.	Such notice must be sent to the Applicant by the Registrar within *twenty-four hours* from the time of submission (Rule 18 (2)).
Notice to parties against whom indemnity claimed.	Notice of claim to an indemnity to be filed *five clear days* before the day fixed for proceeding with the Arbitration (Rule 19).
Fixing day for hearing Special Case.	Such day shall be fixed so as to allow notice to be given *ten days at least* before the day fixed for the hearing (Rule 30 (3)).
Memorandum under Schedule II. (8).	Must be sent to Registrar *as soon as may be* after matter has been decided (Rule 38 (1)).
Proceeding for Record of Memorandum or Rectification of Register.	Application to be made on notice in writing to be filed with the Registrar, copies of which must be served *ten clear days* at least before the hearing of the application (Rule 45).
Application to determine costs payable to solicitor or agent under Schedule II. (12).	Application to be made on notice in writing to be filed with the Registrar, copies of which must be served *ten clear days* at least before the hearing of the application (Rule 46).
Application to stay proceedings before or after award on refusal of workman to submit to medical examination under Schedule I. (3) or (11).	Such application must be made on notice in writing to be filed with the Registrar, copies of which must be served *five clear days* at least before the hearing of the application (Rule 50).
Appeal to Court of Appeal.	By notice of motion, which is an *eight days' notice.* Appeal to be entered within *twenty-one days* from date of award (Order LIX Rules 10 and 12).

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APPENDIX G

SPECIMENS OF AGREEMENTS TO BE FILED UNDER SCHEDULE II. (8)

Form 1.

Declaration of Liability, where Workman earning the same wages as before the accident.

Memorandum of Agreement made the day of between A.B. of and C.D. of

Whereas the said A.B. claimed from the said C.D. as compensation, in respect of injuries caused to him on the day of by accident, arising out of and in the course of his employment by the said C.D., the weekly payment of , being 50 per cent. of the average weekly wages of the said A.B.

And whereas the said C.D. admitted his liability under the Workmen's Compensation Act, 1897, and has paid to the said A.B. such said weekly sums, up to and including the week ending the day of as compensation under the said Act.

And whereas the said A.B. on the day of was again employed by the said C.D. at his said works.

And whereas the said A.B. has since the said day of earned and is now earning full wages at such employment. Now it is hereby agreed as follows, that is to say:—

That in the event of the said A.B. hereafter being totally or partially incapacitated for work, or in the event of the said A.B. hereafter being unable to earn full wages as aforesaid, that is to say, the average weekly sum of in the employment of said C.D., or in any other employment, as a result of the said injuries, the said A.B. shall be entitled to compensation under the said Act, the amount of such compensation to be ascertained, failing agreement, by arbitration under the said Act, which said compensation the said C.D. admits his liability to pay.

(Signed) A.B. Witness to the Signature of A.B.
,, C.D. ,, ,, C.D.

Form 2.

Agreement for Payment of a Weekly Sum.

Memorandum of Agreement made the day of between A.B. of and C.D. of

Whereas the said A.B. was on the day of injured by accident arising out of and in the course of his employment by the said C.D., and was thereby *totally* (*or partially*) incapacitated for work. Now it is hereby agreed as follows, that is to say:—

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1. The said C.D. agrees to pay to the said A.B. the weekly sum of as compensation under the Workmen's Compensation Act, 1897, such weekly payment to commence as from the day of , and to continue during the said A.B.'s incapacity for work, or until such payment shall be ended, diminished, increased, or redeemed in accordance with the provisions of the said Act.

2. The said A.B. agrees to accept such weekly payments in full discharge of the liability of the said C.D. to pay compensation to him under the provisions of the said Act.

FORM 3.

Agreement to accept Lump Sum after Weekly Payments have been continued for Six Months.

Memorandum of Agreement made the day of between A.B. of and C.D. of .

Whereas the said A.B. was on the day of injured by accident, arising out of and in the course of his employment by the said C.D., and was thereby *totally* (*or partially*) incapacitated for work.

And whereas the said A.B. claimed from the said C.D., as compensation in respect of his said injury, the weekly payment of .

And whereas the said C.D. admitted his liability under the Workmen's Compensation Act, 1897, and has paid to the said A.B. such weekly sums, as compensation under the said Act, from the day of up to and including the day of , being a period of six months (*or over six months* as the case may be).

And whereas the said C.D. now desires that such weekly payment may be redeemed according to the provisions of the said Act. Now it is hereby agreed as follows, that is to say:—

1. The said C.D. agrees to pay to the said A.B. the sum of £ (the receipt whereof is hereby acknowledged by the said A.B.) as a lump sum by way of redemption of the said weekly payments, in full satisfaction and discharge of all claims of the said A.B. against the said C.D., in respect of the said injury.

2. The said A.B. agrees to accept such lump sum in full satisfaction and discharge of the liability of the said C.D. to pay compensation to him under the provisions of the said Act.

(Signed) A.B. Witness to the Signature of A.B.
" C.D. " " C.D.

FORM 4.

Agreement to accept Lump Sum where Payments have not been continued for Six Months.

Memorandum of Agreement made the day of between A.B. of and C.D. of

Whereas the said A.B. was on the day of injured by accident arising out of and in the course of his employment by the said C.D., and was thereby *totally* (*or partially*) incapacitated for work.

And whereas the said A.B. claimed from the said C.D. compensation under the Workmen's Compensation Act, 1897.

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And whereas the said C.D. admits his liability under the said Act. Now it is hereby agreed as follows, that is to say:—

1. The said C.D. agrees to pay to the said A.B. the sum of £ (the receipt whereof is hereby acknowledged by the said A.B.) as a lump sum in full satisfaction and discharge of all claims of the said A.B. against the said C.D. in respect of the said injury.

2. The said A.B. agrees to accept such lump sum in full satisfaction and discharge of the liability of the said C.D. to pay compensation to him under the provisions of the said Act.

(Signed) A.B. Witness to the Signature of A.B.
" C.D. " " C.D.

N.B.—*As to whether any agreement by a workman to accept a lump sum before weekly payments have been continued for six months can bind his dependants, see notes on pp.* 32, 33.

FORM 5.

Agreement as to Compensation payable to Dependants.

Memorandum of Agreement made the day of between C.D. (*i.e. the employer*) of , of the first part, E.F., G.H., etc. (*i.e. all the dependants*), of the second part, and A.B. (*i.e. the personal representative if there is one*) of , of the third part.

Whereas X.Y., late of , was on the day of injured by accident arising out of and in the course of his employment by the said C.D.

And whereas such injury on the day of resulted in the death of the said X.Y.

And whereas the said E.F., G.H., etc., are the only dependants of the said X.Y. within the meaning of the Workmen's Compensation Act, 1897.

And whereas it has been agreed between the parties hereto that compensation under the said Act shall be paid by the said C.D. in respect of the death of the said X.Y. Now it is hereby agreed as follows, that is to say:—

1. The said C.D. shall pay to the said A.B. (*i.e. if there is a personal representative*) the sum of £ as compensation for the death of the said X.Y. (the receipt of which said sum the said A.B. hereby acknowledges).

2. The said sum of £ shall be applied as follows:—

[*Here set out particulars as to the application of the money.*]

3. The said E.F., G.H., etc., agree to accept the said sum of £ in full satisfaction and discharge of all claims upon the said C.D., in respect of the death of the said X.Y.

(Signed) C.D. Witness to the Signature of C.D.
" E.F., G.H, etc. " " E.F., G.H., etc.
" A.B. " " A.B.

N.B.—*Where the dependants are infants, or where all the dependants are not known, it would be unwise to file an agreement as above. The employer will be well advised, in such cases, not to effect a settlement, but to proceed under Schedule I. (5) and have the matter determined by arbitration.* See note on p. 197.

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APPENDIX H

FORM OF NOTICE OF APPEAL

In the Court of Appeal

On appeal from the County Court of

holden at

In the matter of the Workmen's Compensation Act, 1897.

Between A.B.
Applicant
and
C.D.
Respondent

TAKE NOTICE that this honourable Court will be moved on the day of , or so soon thereafter as Counsel can be heard, by E.F. of Counsel for the above-named *Applicant* [or *Respondent*, as the case may be], that the award made by his Honour Judge on the day of in favour of the said C.D. [or A.B., as the case may be], be set aside and an award made in favour of the said A.B. [or C.D., as the case may be].

The following are the grounds for appeal:—

1. That the County Court Judge was wrong in law in holding that [*here state point of law appealed upon, e.g.* the employment of the said A.B. was not an employment to which the Workmen's Compensation Act, 1897, applies].
2. That the County Court Judge was wrong in law in holding that [*e.g.* the said A.B. was not at the time of the accident employed on, in, or about a factory within the meaning of the Workmen's Compensation Act, 1897.

Dated this day of
(Signed) G. H.
[Address]
Solicitor for the above-named Applicant.

To the above-named Respondent,
and to Messrs. , his Solicitors

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APPENDIX I

WORKMEN'S COMPENSATION ACT, 1897

The Workmen's Compensation Rules, 1900. *Dated November* 27, 1900.

The following additional rules shall have effect under the Workmen's Compensation Act, 1897.

They may be cited as the Workmen's Compensation Rules, 1900, and shall be read and construed as if they were contained in the Workmen's Compensation Rules, 1898; and each of these rules may be cited with reference to those Rules by the number in square brackets set against the rule at the commencement thereof; and they shall come into operation on the first day of January one thousand nine hundred and one.

Application for Arbitration.

Application by employer.

1. [10*a*.] (1.) Where an employer on whom a claim for compensation has been made desires to make an application for the settlement of any matter by arbitration, he shall file a request for arbitration in accordance with Rule 8, to which the workman, or the legal personal representative (if any) and the persons claiming to be dependants of a deceased workman, or the other persons (as the case may be) on whose behalf the claim was made shall be respondents.

(2.) Particulars shall be appended or annexed to the request, containing—

(*a*) A concise statement of the circumstances under which the application is made;

(*b*) A statement whether the applicant admits his liability to pay compensation, or denies such liability, wholly or partially, with (in the latter case) a statement of the grounds on and extent to which he denies liability.

(*c*) A statement of the matters which the applicant desires to have settled by arbitration; and

(*d*) The full names and addresses of the respondents, and of the applicant and his solicitor, if the proceedings are commenced through a solicitor.

Notice of Day fixed.

Notice where employer is applicant.

2. (1.) [14. (2).] Where the request is filed by an employer, the notices to be served on the respondents shall be modified by the omission of the words therein relating to the denial or admission of liability to pay compensation.

Form 7.

(2.) [14. (3).] The words 'ten clear days' shall be substituted for the words 'five clear days' in Form 7 in the Appendix.

Answer by Respondents.

Answer where employer is applicant.

3. [17. (5).] The provisions of this rule shall, with the necessary modifications, apply to a case in which a request for arbitration is filed by an employer; but a respondent who fails to file an answer shall not be taken to admit the truth of any statement in the applicant's particulars in which he denies, wholly or partially, his liability to pay compensation.

Submission to Award, or Payment into Court.

Submission to award or payment into Court where employer is applicant.

4. [18. (7).] The provisions of this rule shall, with the necessary modifications, apply to a case in which an employer who has filed a request for arbitration admits liability to pay compensation.

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Notice to Parties against whom Indemnity claimed.

5. [22*a*.] The provisions of Rules 19 to 22 shall, with the necessary modifications, apply to a case in which an employer who has filed a request for arbitration claims to be entitled to indemnity over against any person not a party to the arbitration.

Third party procedure where employer is applicant.

Procedure on Arbitration.

6. [24. (2).] Provided, that the burden of proof of any facts which are not admitted shall be the same, whoever the party may be by whom the request for arbitration is filed.

Burden of proof of facts not admitted.

Costs.

7. [33. (1) *a*.] Proceedings on an arbitration shall be within Order La., Rule 7.

Costs.

[The Rule referred to is as follows:—

ORDER LA.

7. The Judge may, in his discretion, in any action under the Employer's Liability Act, any action or matter remitted from the High Court, any action or matter commenced under the admiralty or equity jurisdiction of the Court, or any action of ejectment, or in which title to any corporeal or incorporeal hereditaments comes in question, order that any of the following items mentioned in the scale of costs shall be allowed to the party in whose favour the order is made, in addition to or in substitution for, as the case may be, the costs to which he would otherwise be entitled, viz. items 31, 70, 86, and 93.]

Proceedings under Debtors' Act, 1869, *s.* 5.

8. [49*a* (1).] Where proceedings by way of judgment summons under section 5 of the Debtors' Act, 1869, are taken against a party liable to pay compensation or costs under any award, memorandum, or certificate, who has made default in payment of the amount awarded, or, where payment is to be made by instalments, of any instalment, the County Court Rules for the time being in force as to the committal of judgment debtors shall, with any necessary modifications, apply to such proceedings; provided, that the Court shall not alter the terms or mode of payment of any sum to become payable in future under any award, memorandum, or certificate, otherwise than by consent, or under paragraph 12 of the second schedule to the Act.

Proceedings under Debtors' Act, 1869, 32 & 33 Vict. c. 62, s. 5.

(2) Where the amount in payment of which default has been made is not payable into Court, the party applying for a judgment summons shall satisfy the Court, by affidavit, as to the amount in payment of which default has been made.

(3) A judgment summons issued under this rule shall be according to the form 23A in the Appendix.

Other Proceedings for Enforcement of Award, Memorandum, or Certificate.

9. [49*b*.] The County Court Rules for the time being in force as to proceedings for the enforcement of or the recovery of money due under judgments or orders of the County Court otherwise than by execution or committal shall, with the necessary modifications, apply to proceedings for the enforcement of or the recovery of money due under any award, memorandum, or certificate.

Other proceedings for enforcement of award, etc.

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APPENDIX

FORM 23A.

Judgment Summons on Award, Memorandum, or Certificate.

In the County Court of
holden at
, [*Title as in award, memorandum, or certificate.*]

Whereas on the day of
an award was made in the above-mentioned matter by the judge (*or* by Mr. , an arbitrator appointed by the judge), whereby it was ordered (*state operative parts of award*):
[*or* whereas on the day of
a memorandum was recorded in this Court of an agreement (*or* decision *or* award) come to (*or* given *or* made) in the above-mentioned matter whereby it was agreed (*or* ordered) [*state operative parts of agreement, decision, or award*]:
[*or* whereas on the day of
a memorandum was recorded in this Court of a certificate given by the County Court of holden at
to the effect that [*state operative parts of certificate*]:
And whereas default has been made in payment of the sum of £
payable by you the above-named into Court (*or* to the said A.B.) according to the said award [*or* memorandum *or* certificate]:

You the said are therefore hereby summoned to appear personally in this Court at (*place where Court holden*) on the day of 19 , at the hour of in the noon, to be examined on oath by the Court touching the means you have or have had since the date of the award (*or* memorandum *or* certificate) to pay the said sum, in payment of which you have made default; and also to show cause why you should not be committed to prison for such default.

Dated this day of 19 .

Registrar.

	£	s.	d.
Amount in payment of which default has been made . .			
Cost of this summons			
Total sum due . . .			

NOTE.—*This form to be adapted to the circumstances of the case where a summons is issued under the County Court Rules, Order XXV., Rule 14b, against a person alleged to be a partner in or sole member of a firm, or to be carrying on business in any name other than his own. If an order of commitment is made it should be according to the Form 57 in the Appendix to the County Court Rules, such form being adapted to the case of default in payment of an amount due under an award, memorandum, or certificate.*

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We, Alfred Martineau, Henry J. Stonor, Sir Richard Harington, Baronet, William L. Selfe, and William Cecil Smyly, being the five judges of the County Courts appointed for the making of Rules under section one hundred and sixty-four of the County Courts Act, 1888, having made the foregoing Rules of Court pursuant to paragraph ten of the Second Schedule to the Workmen's Compensation Act, 1897, do hereby certify the same under our hands and submit them to the Lord Chancellor accordingly.

I allow these Rules,

HALSBURY, C.

The 27th of November 1900.

APPENDIX J

EXTRACTS FROM THE FACTORY ACTS

Definition of Factory in the Workmen's Compensation Act, 1897.

'Factory has the same meaning as in the Factory and Workshop Acts, 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery, or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895, and every laundry worked by steam, water, or other mechanical power.'

The material sections of the Acts referred to are the following :—

Sections 93 *and* 96 *of the Factory and Workshop Act*, 1878 (41 *Vict. c.* 16).

Section 93. The expression 'textile factory' in this Act means any premises wherein, or within the close or curtilage of which, steam, water, or other mechanical power is used to move or work any machinery employed in repairing, manufacturing, or finishing, or in any process incident to the manufacture of cotton, wool, hair, silk, flax, hemp, jute, tow, china-grass, cocoa-nut fibre, or other like material, either separately or mixed together, or mixed with any other material, or any fabric made thereof.

Provided that print works, bleaching and dyeing works, lace warehouses, paper mills, flax scutch mills, rope works, and hat works shall not be deemed to be textile factories.

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The expression 'non-textile factory' in this Act means :—

(1.) Any works, warehouses, furnaces, mills, foundries, or places named in Part One of the Fourth Schedule to this Act.

(2.) Also any premises or places named in Part Two of the said Schedule wherein, or within the close or curtilage or precincts of which, steam, water, or other mechanical power is used in aid of the manufacturing process carried on there.

(3.) Also any premises wherein, or within the close or curtilage or precincts of which, any manual labour is exercised by way of trade or for purposes of gain in or incidental to the following purposes, or any of them; that is to say,

(a) In or incidental to the making of any article or part of any article, or

(b) In or incidental to the altering, repairing, ornamenting, or finishing of any article, or

(c) In or incidental to the adapting for sale of any article,

and wherein, or within the close or curtilage or precincts of which, steam, water, or other mechanical power is used in aid of the manufacturing process carried on there.

The expression 'factory' in this Act means textile factory and non-textile factory, or either of such descriptions of factories.

A part of a factory or workshop may for the purposes of this Act be taken to be a separate factory or workshop; and a room used solely for the purpose of sleeping therein (see Factory and Workshop Act, 1891, sec. 31) shall not be deemed to form part of the factory or workshop for the purposes of this Act.

Where a place situate within the close, curtilage, or precincts forming a factory or workshop is solely used for some purpose other than the manufacturing process or handicraft carried on in the factory or workshop, such place shall not be deemed to form part of that factory or workshop for the purposes of this Act, but shall, if otherwise it would be a factory or workshop, be deemed to be a separate factory or workshop, and be regulated accordingly.

Any premises or place shall not be excluded from the definition of a factory or workshop by reason only that such premises or place are or is in the open air.

This Act shall not apply to such workshops, other than bakehouses, as are conducted on the system of not employing any child, young person, or woman therein, but save as aforesaid applies to all factories and workshops as before defined, inclusive of factories and workshops belonging to the Crown; provided that in case of any public emergency a Secretary of State may exempt a factory or workshop belonging to the Crown from this Act, to the extent and during the period named by him.

The exercise by any child or young person in any recognised efficient school during a portion of the school hours of any manual labour for the purpose of instructing such child or young person in any art or handicraft, shall not be deemed to be an exercise of manual labour for the purpose of gain within the meaning of this Act.

Section 96. The expression 'child' means a person under the age of fourteen years.

The expression 'young person' means a person of the age of fourteen and under the age of eighteen years.

The expression 'woman' means a woman of eighteen years of age and upwards.

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The following is the Schedule above referred to :—

Fourth Schedule—List of Factories and Workshops.

Part One.

Non-Textile Factories.

(1.) 'Print works,' that is to say, any premises in which any persons are employed to print figures, patterns, or designs upon any cotton, linen, woollen, worsted, or silken yarn, or upon any woven or felted fabric not being paper;

(2.) 'Bleaching and dyeing works,' that is to say, any premises in which the processes of bleaching, beetling, dyeing, calendering, finishing, hooking, lapping, and making up and packing any yarn or cloth of any material, or the dressing or finishing of lace, or any one or more of such processes, or any process incidental thereto, are or is carried on;

(3.) 'Earthenware works,' that is to say, any place in which persons work for hire in making or assisting in making, finishing, or assisting in finishing, earthenware or china (see Factory and Workshop Act, 1891, sec. 38) of any description, except bricks and tiles not being ornamental tiles;

(4.) 'Lucifer match works,' that is to say, any place in which persons work for hire in making lucifer matches, or in mixing the chemical materials for making them, or in any process incidental to making lucifer matches, except the cutting of the wood;

(5.) 'Percussion cap works,' that is to say, any place in which persons work for hire in making percussion caps, or in mixing or storing the chemical materials for making them, or in any process incidental to making percussion caps;

(6.) 'Cartridge works,' that is to say, any place in which persons work for hire in making cartridges, or in any process incidental to making cartridges, except the manufacture of the paper or other material that is used in making the cases of the cartridges;

(7.) 'Paper staining works,' that is to say, any place in which persons work for hire in printing a pattern in colours upon sheets of paper, either by blocks applied by hand, or by rollers worked by steam, water, or other mechanical power;

(8.) 'Fustian cutting works,' that is to say, any place in which persons work for hire in fustian cutting;

(9.) 'Blast furnaces,' that is to say, any blast furnace or other furnace or premises in or on which the process of smelting or otherwise obtaining any metal from the ores is carried on;

(10.) 'Copper mills';

(11.) 'Iron mills,' that is to say, any mill, forge or other premises in or on which any process is carried on for converting iron into malleable iron, steel, or tin plate, or for otherwise making or converting steel;

(12.) 'Foundries,' that is to say, iron foundries, copper foundries, brass foundries, and other premises or places in which the process of founding or

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casting any metal is carried on; except any premises or places in which such process is carried on by not more than five persons, and as subsidiary to the repair or completion of some other work;

(13.) 'Metal and india-rubber works,' that is to say, any premises in which steam, water, or other mechanical power is used for moving machinery employed in the manufacture of machinery, or in the manufacture of any article of metal not being machinery, or in the manufacture of india-rubber or of gutta-percha, or of articles made wholly or partially of india-rubber or gutta-percha;

(14.) 'Paper mills,' that is to say, any premises in which the manufacture of paper is carried on;

(15.) 'Glass works,' that is to say, any premises in which the manufacture of glass is carried on;

(16.) 'Tobacco factories,' that is to say, any premises in which the manufacture of tobacco is carried on;

(17.) 'Letterpress printing works,' that is to say, any premises in which the process of letterpress printing is carried on;

(18.) 'Bookbinding works,' that is to say, any premises in which the process of bookbinding is carried on;

(19.) 'Flax scutch mills.'

Part Two.

Non-Textile Factories and Workshops.

(20.) 'Hat works,' that is to say, any premises in which the manufacture of hats, or any process incidental to their manufacture, is carried on;

(21.) 'Rope works,' that is to say, any premises being a ropery, ropewalk, or rope work, in which is carried on the laying or twisting or other process of preparing or finishing the lines, twines, cords, or ropes, and in which machinery moved by steam, water, or other mechanical power is not used for drawing or spinning the fibres of flax, hemp, jute, or tow, and which has no internal communication with any buildings or premises joining or forming part of a textile factory, except such communication as is necessary for the transmission of power;

(22.) 'Bakehouses,' that is to say, any places in which are baked bread, biscuits, or confectionery, from the baking or selling of which a profit is derived;

(23.) 'Lace warehouses,' that is to say, any premises, room, or place not included in bleaching and dyeing works as hereinbefore defined, in which persons are employed upon any manufacturing process or handicraft in relation to lace, subsequent to the making of lace upon a lace machine moved by steam, water, or other mechanical power;

(24.) 'Shipbuilding yards,' that is to say, any premises in which any ships, boats, or vessels used in navigation are made, finished, or repaired;

(25.) 'Quarries,' that is to say, any place, not being a mine, in which persons work in getting slate, stone, coprolites, or other minerals;

(26.) 'Pit banks,' that is to say, any place above ground adjacent to a shaft of a mine, in which place the employment of women is not regulated by the

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Coal Mines Regulation Act, 1872, or the Metalliferous Mines Regulation Act, 1872, whether such place does or does not form part of the mine within the meaning of those Acts.

Factory and Workshop Act, 1883 (46 *and* 47 *Vict. c.* 53).

Section 18. The expression 'white lead factory' includes every factory and workshop in which the manufacture of white lead is carried on.

Cotton Cloth Factories Act, 1889 (52 *and* 53 *Vict. c.* 62).

Section 4. The expression 'cotton cloth factory' shall mean any room, shed, or workshop, or any part thereof, in which the weaving of cotton is carried on.

Factory and Workshop Act, 1891 (54 *and* 55 *Vict. c.* 75).

Section 38. There shall be added in line 3, sub-section (3.) of the Fourth Schedule of the principal Act, after 'earthenware,' the words 'or china.'

The Factory and Workshop Act, 1895 (58 *and* 59 *Vict. c.* 37).

Section 23. (1.) The following provisions, namely :—

(i) Section eighty-two of the principal Act;

(ii) The provisions of the Factory Acts with respect to accidents;

(iii) Section sixty-eight of the principal Act with respect to the powers of inspectors;

(iv) Sections eight to twelve of the Act of 1891 with respect to special rules for dangerous employments; and

(v) The provisions of this Act with respect to the power to make orders to dangerous machines; shall have effect as if

(*a*) Every dock, wharf, quay, and warehouse, and so far as relates to the process of loading or unloading therefrom or thereto, all machinery and plant used in that process; and

(*b*) Any premises on which machinery worked by steam, water, or other mechanical power is temporarily used for the purpose of the construction of a building or any structural work in connection with a building;

were included in the word factory, and the purpose for which the machinery is used were a manufacturing process, and as if the person who by himself, his agents, or workmen temporarily uses any such machinery for the before-mentioned purpose were the occupier of the said premises; and for the purpose of the enforcement of those sections the person having the actual use or occupation of a dock, wharf, quay, or warehouse, or of any premises within the same or forming part thereof, and the person so using any such machinery shall be deemed to be the occupier of a factory.

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(2.) The provisions of this Act with respect to notice of accidents and the formal investigation of accidents shall have effect as if—

Any building which exceeds thirty feet in height, and which is being constructed or repaired by means of a scaffolding; and

Any building which exceeds thirty feet in height, and in which more than twenty persons, not being domestic servants, are employed for wages;

were included in the word 'factory,' and as if, in the first case, the employer of the persons engaged in such construction or repair, and, in the second case, the occupier of the building, were the occupier of a factory.

The following are the material parts of such sections of the Factory Acts as are applied to docks, etc., by this section :—

(i) *Section* 82 *of the principal Act* (*i.e. Act of* 1878).

If any person is killed or suffers any bodily injury in consequence of the occupier of a factory having neglected to fence any machinery required by or in pursuance of this Act to be securely fenced, or having neglected to maintain such fencing, or in consequence of the occupier of a factory or workshop having neglected to fence any vat, pan, or other structure required by or in pursuance of this Act to be securely fenced, or having neglected to maintain such fencing, the occupier of the factory or workshop shall be liable to a fine not exceeding one hundred pounds, the whole or any part of which may be applied for the benefit of the injured person or his family, or otherwise as a Secretary of State determines:

Provided that the occupier of a factory shall not be liable to a fine under this section, if an information against him for not fencing the part of the machinery, or the vat, pan, or other structure by which the death or bodily injury was inflicted, has been heard and dismissed previous to the time when the death or bodily injury was inflicted.

(ii) *The provisions of the Factory Acts with respect to accidents.*

(a) *Section* 22 (3.) *of the Factory and Workshop Act,* 1891 (54 *and* 55 *Vict. c.* 75).

Where a death has occurred by accident in any factory or workshop, the coroner shall forthwith advise the district inspector under this Act of the time and place of the holding of the inquest, and at such inquest any relative of any person whose death may have been caused by the accident with respect to which the inquest is being held, and any inspector under the principal Act, and the occupier of the factory or workshop in which the accident occurred, and any person appointed by the order in writing of the majority of the workpeople employed in the said factory or workshop shall be at liberty to attend and examine any witness either in person or by his counsel, solicitor, or agent, subject nevertheless to the order of the coroner.

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(b) *Sections* 18-21 *of the Factory and Workshop Act*, 1895 (58 *and* 59 *Vict. c.* 37).

Section 18. (1.) Where there occurs in a factory or workshop any accident which either—

(*a*) Causes loss of life to a person employed in the factory or in the workshop; or

(*b*) Causes to any person employed in the factory or workshop such bodily injury as to prevent him on any one of the three working days next after the occurrence of the accident from being employed for five hours on his ordinary work,

written notice shall forthwith be sent to the inspector for the district.

(2.) If the accident causes loss of life, or is produced either by machinery moved by steam, water, or other mechanical power, or through a vat, pan, or other structure filled with hot liquid or molten metal, or other substance, or by explosion or escape of gas, steam, or metal, then, unless notice thereof is required by section sixty-three of the Explosives Act, 1875, to be sent to a Government inspector, notice thereof shall forthwith be sent to the certifying surgeon of the district.

(3.) The notice shall state the residence of the person killed or injured, and the place to which he has been removed.

(4.) If any notice required by this section to be sent with respect to an accident in a factory or workshop is not so sent, the occupier of the factory or workshop shall be liable to a fine not exceeding five pounds.

(5.) If any accident to which this section applies occurs to a person employed in an iron mill or blast furnace, or other factory or workshop, where the occupier is not the actual employer of the person killed or injured, the actual employer shall immediately report the same to the occupier, and in default shall be liable to a fine not exceeding five pounds.

(6.) This section shall extend to workshops conducted on the system of not employing any child, young person, or woman therein.

Section 19. Where a death has occurred by accident in any factory or workshop, the coroner shall adjourn the inquest, unless an inspector or some person on behalf of a Secretary of State is present to watch the proceedings, and shall at least four days before holding the adjourned inquest send to the inspector notice in writing of the time and place of holding the adjourned inquest:

Provided that if the accident has not occasioned the death of more than one person, and the coroner has sent to the inspector notice of the time and place of holding the inquest at such time as to reach the inspector not less than twenty-four hours before the time of holding the same, it shall not be imperative on him to adjourn the inquest in pursuance of this section if the majority of the jury think it unnecessary so to adjourn.

Section 20. (1.) Every occupier of a factory or workshop shall keep a register of accidents, and shall enter therein every accident occurring in the factory or workshop of which notice is required by the Factory Acts within one week after the occurrence of the accident, and this register shall be at all times open to inspection by the inspector and by the certifying surgeon for the district.

(2.) If any occupier of a factory or workshop makes default in complying

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with the requirements of this section, he shall be liable on summary conviction to a fine not exceeding ten pounds.

Section 21. (1.) Where it appears to the Secretary of State that a formal investigation of any accident occurring in a factory or workshop and its causes and circumstances is expedient, the Secretary of State may direct that such an investigation be held, and with respect to any such investigation the provisions of sections forty-five and forty-six of the Coal Mines Regulation Act, 1887, shall have effect, except that references to the said Act in the said section forty-five shall be construed as references to the Factory Acts.

(2.) This section shall extend to workshops conducted on the system of not employing any child, young person, or woman therein.

(iii) *Section* 68 *of the Factory and Workshop Act*, 1878 (41 *Vict. c.* 16).

An inspector under this Act shall, for the purpose of the execution of this Act, have power to do all or any of the following things, namely :—

(1.) To enter, inspect, and examine at all reasonable times by day and night a factory and a workshop and every part thereof when he has reasonable cause to believe that any person is employed therein, and to enter by day any place which he has reasonable cause to believe to be a factory or workshop; and

(2.) To take with him in either case a constable into a factory in which he has reasonable cause to apprehend any serious obstruction in the execution of his duty; and

(3.) To require the production of the registers, certificates, notices, and documents kept in pursuance of this Act, and to inspect, examine, and copy the same; and

(4.) To make such examination and inquiry as may be necessary to ascertain whether the enactments for the time being in force relating to public health and the enactments of this Act are complied with, so far as respects the factory or workshop and the persons employed therein; and

(5.) To enter any school in which he has reasonable cause to believe that children employed in a factory or workshop are for the time being educated; and

(6.) To examine either alone or in the presence of any other person, as he thinks fit, with respect to matters under this Act, every person whom he finds in a factory or workshop, or such a school as aforesaid, or whom he has reasonable cause to believe to be or to have been within the preceding two months employed in a factory or workshop, and to require such person to be so examined and to sign a declaration of the truth of the matters respecting which he is so examined; and

(7.) To exercise such other powers as may be necessary for carrying this Act into effect.

The occupier of every factory and workshop, his agents and servants, shall furnish the means required by an inspector as necessary for an entry, inspection, examination, inquiry, or the exercise of his powers under this Act in relation to such factory and workshop.

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Every person who wilfully delays an inspector in the exercise of an power under this section, or who fails to comply with a requisition of an inspector in pursuance of this section, or to produce any certificate or document which he is required by or in pursuance of this Act to produce, or who conceals or prevents a child, young person, or woman from appearing before or being examined by an inspector, or attempts so to conceal or prevent a child, young person, or woman, shall be deemed to obstruct an inspector in the execution of his duties under this Act: Provided always, that no one shall be required under this section to answer any question or to give any evidence tending to criminate himself.

Where an inspector is obstructed in the execution of his duties under this Act, the person obstructing him shall be liable to a fine not exceeding five pounds; and where an inspector is so obstructed in a factory or workshop, the occupier of that factory or workshop shall be liable to a fine not exceeding five, or where the offence is committed at night, twenty pounds; and where an inspector is so obstructed in a factory or workshop within the meaning of section sixteen of this Act, the occupier shall be liable to a fine not exceeding one, or where the offence is committed at night, five pounds.

(iv) *Sections* 8 *to* 12 *of the Factory and Workshop Act,* 1891 (54 *and* 55 *Vict. c.* 75).

Section 8. (1.) Where the Secretary of State certifies that in his opinion any machinery or process or particular description of manual labour used in a factory or workshop (other than a domestic workshop), is dangerous or injurious to health, or dangerous to life or limb, either generally or in the case of women, children, or any other class of persons, or that the provision for the admission of fresh air is not sufficient, or that the quantity of dust generated or inhaled in any factory or workshop is dangerous or injurious to health, the chief inspector may serve on the occupier of the factory or workshop a notice in writing, either proposing such special rules, or requiring the adoption of such special measures as appear to the chief inspector to be reasonably practicable, and to meet the necessities of the case.

(2.) Unless within twenty-one days after receipt of the notice the occupier serves on the chief inspector a notice in writing that he objects to the rules or requirement, the rule shall be established, or, as the case may be, the requirement shall be observed.

(3.) If the notice of objection suggests any modification of the rules or requirement, the Secretary of State shall consider the suggestion and may assent thereto with or without any further modification which may be agreed on between the Secretary of State and the occupier, and thereupon the rules shall be established, or, as the case may be, the requirement shall be observed, subject to such modification.

Sub-section (4.) provides that matters in difference between the Secretary of State and the occupier shall be referred to arbitration.

The remaining sub-sections are immaterial as far as the Workmen's Compensation Act is concerned.

Section 9. (1.) If any person who is bound to observe any special rules established for any factory or workshop under this Act acts in contravention of, or fails to comply with, any such special rule, he shall be liable on summary

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conviction to a fine not exceeding two pounds; and the occupier of the factory or workshop shall also be liable on summary conviction to a fine not exceeding ten pounds, unless he proves that he had taken all reasonable means, by publishing, and to the best of his power enforcing, the rules to prevent the contravention or non-compliance.

(2.) A factory or workshop in which there is a contravention of any requirement made under this Act shall be deemed not to be kept in conformity with the principal Act.

Section 10. (1.) After special rules are established under this Act in any factory or workshop, the Secretary of State may from time to time propose to the occupier of the factory or workshop any amendment of the rules or any new rules; and the provisions of this Act with respect to the original rules shall apply to all such amendments and new rules in like manner, as nearly as may be, as they apply to the original rules.

(2.) The occupier of any factory or workshop in which special rules are established, may from time to time propose in writing to the chief inspector, with the approval of the Secretary of State, any amendment of the rules or any new rules, and the provisions of this Act with respect to a suggestion of an occupier for modifying the special rules proposed by a chief inspector shall apply to all such amendments and new rules in like manner, as nearly as may be, as they apply to such a suggestion.

Section 11. (1.) Printed copies of all special rules for the time being in force under this Act in any factory or workshop shall be kept posted up in legible characters in conspicuous places in the factory or workshop where they may be conveniently read by the persons employed. In a factory or workshop in Wales or Monmouthshire the rules shall be posted up in the Welsh language also.

(2.) A printed copy of all such rules shall be given by the occupier to any person affected thereby on his or her application.

(3.) If the occupier of any factory or workshop fails to comply with any provision of this section, he shall be liable on summary conviction to a fine not exceeding ten pounds.

(4.) Every person who pulls down, injures, or defaces any special rules when posted up in pursuance of this Act, or any notice posted up in pursuance of the special rules, shall be liable on summary conviction to a fine not exceeding five pounds.

Section 12. An inspector shall, when required, certify a copy which is shown to his satisfaction to be a true copy of any special rules for the time being established under this Act for any factory or workshop, and a copy so certified shall be evidence (but not to the exclusion of other proof) of those special rules, and of the fact that they are duly established under this Act.

(v) *Section* 4 *of the Factory and Workshop Act*, 1895 (58 *and* 59 *Vict. c.* 37).

Section 4. (1.) A court of summary jurisdiction may, on complaint by an inspector, and on being satisfied that any machine used in a factory or workshop is in such a condition that it cannot be used without danger to life or limb, by order prohibit the machine from being used, or, if it is capable of repair or alteration, from being used until it is duly repaired or altered.

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(2.) Where a complaint has been made under this section, the court or a justice may, on application *ex parte* by the inspector, and on receiving evidence that the use of any such machine involves imminent danger to life, make an interim order prohibiting, either absolutely or subject to conditions, the use of the machine until the earliest opportunity for hearing and determining the complaint.

(3.) If there is any contravention of an order under this section, the person entitled to control the use of the machine shall be liable to a fine not exceeding forty shillings a day during such contravention.

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ADDENDUM

CERTIFICATE OF MEDICAL REFEREE CONCLUSIVE.—Is the certificate of the Medical Referee conclusive evidence only as to the actual condition of the workman, or is it also conclusive on the question whether that condition is due to the injury? This point came before the Court of Session in *The Boase Spinning Company, Ltd.* v. *M'Avan* (38 S.L.R. 772). A workman in receipt of weekly payments under the Act was required by his employers to submit himself for a medical examination, which he did. Being dissatisfied with the certificate given, he afterwards submitted himself to a Medical Referee, whose report stated that he had recovered from his injuries, that he would probably never be capable for hard manual labour, but only for light employment, but that this disability was not connected with his injuries. In an application by the employers for an order terminating the weekly payments, it was held (Lord Young dissenting) that the certificate of the Medical Referee was conclusive evidence, not only as to the condition of the injured workman, but as to the question whether his condition was due to the accident or to other causes; that consequently the workman here must be held to have recovered from his injuries, and that the Arbitrator was bound in respect of the certificate to make an order terminating the weekly payments. See Schedule I. (11.) at p. 200.

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